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A TREATISE ON

PHILIPPINE PRACTICE

INCLUDING THE

LAW OF EVIDENCE APPLICABLE TO ALL COURTS AND ALL LAWS RELATING TO THE PRIMARY COURTS

TOPICALLY ARRANGED AND ANNOTATED, WITH APPROPRIATE DECISIONS OF THE SUPREME COURT AND OPINIONS OF THE ATTORNEY GENERAL, DOWN TO JULY 15, 1907.

BY

CHARLES SUMNER LOBINGIER, PH. D., L. L. M.

Judge of the Court of First Instance, Manila; First Vice-Chairman Committee to Codify Philippine Laws; Sometime Member of the Nebraska Supreme Court (Commission) and Professor of Law in the University of Nebraska.

AUTHOR OF:

"CORROBORATION"—	3 Encyclopædia of Evidence.
"CONSTITUTIONAL LAW"—	6 Am. & Eng. Encyclopædia of Law (2d Edition)
"EQUITY"—	11 " " " " "
"EXPERT AND OPINION EVIDENCE"—	12 " " " " "
"FORECLOSURE"—	9 Encyclopædia of Pleading and Practice.

AND OTHER CONTRIBUTIONS TO LEGAL ENCYCLOPÆDIAS.

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To

WILLIAM HOWARD TAFT, Statesman and Jurist,

But whose most enduring title to fame is that of the Great Pacificator of the Philippines,
this little volume is appreciatively dedicated in the hope that it may
contribute something toward the consummation of
the work inaugurated by him.

829227

WAR DEPARTMENT

WASHINGTON

January 4, 1907.

My Dear Judge:

I thank you very much for the honor you do me in wishing to dedicate your book to me, and I shall be glad to have it done.

Very sincerely yours,

(Signed) Wm. H. Taft.

Hon. Charles S. Lobingier,

Judge of the Court of First Instance,

Manila, P. I.

PREFACE TO THE SECOND EDITION.

The original occasion of Part One of this work was the need experienced by the author in attempting to supervise and instruct the justices of the peace of the Twelfth Judicial District, where he was then stationed. The fact that the considerable volume of statute law on the subject, not to mention its judicial and official interpretation, was scattered thru a number of volumes, very often not accessible to the justice, and that there was no one book to which he could be referred in order to obtain an intelligent and connected understanding of his duties and powers, appeared to make such an undertaking imperative if any real progress were to be expected. The first edition was necessarily in Spanish as out of the fifty nine justices of the district but one is recalled who had then even a reading knowledge of English. The edition was prepared for, and published in, that district and did not become available elsewhere until its justices were all given opportunity to obtain it at practically the cost of printing.

The early exhaustion of the first edition, the numerous inquiries for the work from different parts of the Archipelago, and the many gratifying assurances that a new edition was needed, have led to the preparation of the present one and its appearance at this time seems to be justified by recent changes in the law. The scope, of this edition, as will be seen, is broader than the first. That was designed primarily and mainly for the justices themselves. The present edition aims to be (1) a manual for magistrates (2) a convenient reference work for lawyers whose practice (whose does not at times?) takes them into the primary courts, (3) a text book for law students and others who may be preparing for a legal or semi-legal vocation, and (4) a guide for constabulary and other peace officers in the direct exercise of their duties, as well as in the hardly less important work of assisting the justices and explaining obscure points in the law.

For the first and, indeed, for each class, it is sought to include all acts or parts of acts relating directly to justice of the peace

courts together with all authoritative interpretations thereof. For the second class, features like the Manila Municipal Court laws have been added, while portions like the "Historical and Comparative" introduction and the elementary notes of explanation are designed particularly for the third class, who should constitute a promising source of supply for future justices of the peace and to whom every opportunity should be offered to fit themselves thoroly for a magistrate's career. The attention of teachers and others who may use the book in this connection is directed to the analytical arrangement of the Table of Contents, enabling it to be used as a rough diagram or syllabus of the subject, showing the correlation of its parts and affording a bird's-eye view of the whole field.

The part relating to evidence, of which more will be said further on, and to civil actions generally, is designed for all classes, including constabulary officers, as that field is not attempted to be covered by the Manual so recently and well prepared for that useful organization.

The author desires here to acknowledge valuable assistance in preparing the first edition rendered by two members of his former court staff—Mr. Norberto Romualdez, Provincial Fiscal of Leyte, and Mr. George C. Taylor, Court Clerk. Acknowledgment of aid is also due to Mr. Clement L. Bouvé, of the Manila Prosecuting Attorney's office, to Mr. Felipe Buencamino, Jr., of the author's present staff, and to other friends—American, Filipino and Spanish, for helpful suggestions and encouraging expressions of appreciation.

Audiencia, Manila,
April 30, 1907.

PART ONE

JUSTICE OF THE PEACE COURTS.

TITLE I

HISTORICAL AND COMPARATIVE. *

"The office of justice of the peace is the most ancient of which it can be said that its powers are wholly derived from statutes." This is the conclusion of Sir Frederick Pollock,[1] the most eminent of living English jurists. He refers here, of course, to England but it is to that country that we must look for the origin of the justice of the peace's office as it exists not only in the United States but also in continental Europe and in the Philippines. Nearly three centuries before Pollock another great English jurist had said, of this office: "It is such a form of government for the tranquility and quiet of the realm as no part of the Christian world hath the like if the same be duly exercised."[2]

Antiquity and Origin

From at least the beginning of the thirteenth century there existed in England a class of local officers known as "*conservatores pacis*" or keepers of the peace.[3] These were at first merely ministerial officers but in 1344 they were invested with criminal jurisdiction.[4] In 1360 the permanent office of justice of the peace was instituted, the name dating from about this time. Eventually some civil jurisdiction was acquired, mostly of a ministerial character, but the main functions of the office, in so far as they are judicial, have, in England, always been con-

1 13 Harv. L. Rev. 184.

2 Sir Edward Coke, Fourth Institute p. 170.

3 See Howard, On the Development of the King's Peace and the English Local Peace-Magistracy, 1 Neb. Univ. Studies 255, 271 for a luminous discussion of this subject. Cf. 1 Blackstone's Commentaries p. 350 et seq.

4 Howard, Id. 274.

* From a contribution by the author to the Law Quarterly Review, London.

nected mainly with the administration of the criminal law.[1] In that country also the justice is a county officer[2] and the position is one of greater dignity and social prestige than in America,[3] whither it was transplanted by the early English colonists, altho in the latter country the justice's court was given civil jurisdiction[4] which was gradually extended until that court has become the one for the trial of small causes, mostly those arising out of contract.

In America

It was during the stormy period of the revolution that France recreated her judicial system abolishing the ancient courts known as "*parlements.*"[5] From England the reformers borrowed, for criminal cases, the jury system (the germ of which like that of the English parliament[6] had been taken from France itself) and from the same country they transplanted the office which they rebaptized under the name of *juge de paix.* This functionary was placed in charge of the lowest of the three grades of tribunals below the Court of Casation—the cantonal—and ever since the revolution the canton has been preeminently, the district of the *juge de paix.*[7] But while in England, as we have seen, the jurisdiction of the justice had been almost exclusively criminal, in France he was given civil jurisdiction which is now final up to one hundred francs (₱40) and which, as to amounts between one and two hundred francs, is subject to appeal.[8] His primary duty, however, is conciliation, and no case can be tried by him until he has, first, sought to bring the parties together. In criminal matters the *juge de*

In France

1 Howard 1 Neb. Univ. Studies 181.

2 Id. 278; 18 Am. & Eng. Encyc. of Law (2d Ed.) 33, 35.

3 Howard 1 Neb. Univ. Studies 279.

"These *Justices of the Peace* or magistrates administer summary jurisdiction in the small town and in the rural districts The position of magistrate is one of influence and honor and is much sought after". Robert Donald (Ed. London Daily Chronicle), British Social Legislation, 83 Outlook, 327.

4 But this, being purely statutory, is construed strictly (Schroeder v Ehlers 31 N. J. L. 44); especially as to actions arising out of tort Taylor v Woods 52 Ala. 474.)

5 These judicial reforms were effected thru the Constitution of 1789-90. See Gardiner's French Revolution (Boston, 1883) 66; 9 Encyc. Brit. (9th Ed.) 600.

6 Id. Vol 19 p. 878.

7 Rougemont, La France (New York, 1886) p. 23.

8 9 Encyc. Brit. (9th Ed) 511.

paix has cognizance of minor offences whose punishment cannot exceed a fine of fifteen francs or imprisonment for five days.

As the French revolutionists had borrowed from England so the Spanish reformers borrowed from France, or perhaps directly from England itself, since they were somewhat under the influence of the great English law reformer, Jeremy Bentham. Prior to the early years of the nineteenth century certain of the Alcaldes were vested with a limited civil and criminal jurisdiction.[1] The Cadiz constitution of 1812, framed under the influence of the reformers, established the "*juicio de conciliacion*"[2] probably taken from the Code Napoleon which had been promulgated only eight years before. This was designated as the "*juicio de paz*" in the "*Reglamento provicional para la administración de justicia*" of 1835[3] and twenty years later the office of "*juez de paz*" was established under that name, (one being appointed for each pueblo in Spain having an *ayuntamiento* or government building) with both civil and criminal jurisdiction.[4]

In Spain

Three decades after the office of justice of the peace had been established in the Peninsula it was transplanted to the Philippines. A Royal Decree of May 29, 1885, provided for the appointment by the Governor-General, upon the nomination of the President (Chief Justice) of the Audiencia of Manila, of justices of the peace.[5] They were municipal officers[6] having jurisdiction[7] wherein the amount claimed did not exceed two hundred pesos, in administration proceedings[8] to make preliminary orders in pueblos

In the Philippines

1 Berriz, *Guia Práctica de los Juzgados de Paz* (Manila 1893) Tomo II pag. 1.

2 Id.

3 Id.

4 Robles, *Manual de los Jueces de Paz* (Iloilo 1887) p. 11.

5 Berriz. *Guia Práctica de los Juzgados de Paz* (Manila, 1893) Tomo II pág. 3 where the Decree is given in full. The President of the Audiencia received nominations from the judges of first instance throughout the archipelago who in turn consulted the parish priest of the town and the civil governor of the province. See Rep. Phil . Com. 1900 Vol. I. p. 59.

6 See Robles p. 59. In the Organic Provisions they are everywhere mentioned in the same category as municipal judges.

7 Sánchez, *Compilación de los disposiciones orgánicas de la administración de Justicia en los Provincias de Ultramar.* (*Madrid 1891*) *Secs. 183, 184,*

8 It is difficult to make the present justices understand that this branch of their jurisdiction has been abolished. In spite of reiterated instructions, cases are continually arising where they attempt to determine questions of heirship and administration.

where no court of first instance held sessions, in proceedings for conciliation and various other civil matters; also "to take cognizance of offenses in first instance" and to conduct preliminary proceedings in criminal cases.[1]

Such in brief was the system that continued in force, nominally at least, for sixteen years. During the revolution courts of justices of the peace, like other courts, became dormant in certain parts of the Archipelago, but orders were issued by the military governor from time to time, reviving and continuing them[2] and in theory there was no change until the epoch-making legislation of the civil commission in the opening year of the twentieth century.[3] Even then the existing courts of justices of the peace were expressly recognized and continued.[4] Their jurisdiction was limited in certain directions and extended in others but both it and the procedure were so changed as to conform closely to those in justice of the peace courts in the United States. Thus the circuit was complete. The two streams which had started in medieval England had flowed in opposite directions but met and mingled in the Philippines. The product forms an interesting chapter in the comparative study of a humble but important branch of judicial institutions and symbolizes the spread of Anglo-Saxon civilization around the globe.

The Blended System

As in England the office boasts of its greatest antiquity, so there also it has reached its fullest development. Not only have the functions of the individual justice increased to such an extent that he is now called the "state's man of all work"[5] but the justices collectively of the shire, or a sub-division thereof, are vested with important duties (discharged only in "sessions" or meetings) connected with local administration.[6] Somewhat

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1 The criminal jurisdiction of the justice was treated in a work on the *Código Penal* (Manila 1895) by Don Angel Selma y Cordero, Judge of First Instance of Bataan.

2 Proclamation of Aug. 14. II Acts of the Commission, 567; Gen. Orders 1899, Nos. 21, 22; 1900, No. 59.

3 Acts 136, 190.

4 Act. 136, Sec. 66; post p. 10.

5 Maitland, Justice and Police p. 92.

6 Id. pp. 89, 90, 111, 166; Howard, Development of the King's Peace, etc., 1 Neb. Univ. Studies 284 et seq.

The functions of the "quarter sessions" were largely removed by the Local Government Act. of 1888 (51 & 52 Vict. c. 41) but those of the special and petty sessions generally remain. Id. 287.

on the order of these "sessions" are the provincial assemblies of justices of the peace now established in the Philippines, except that the latter are, for the present, at least, given no administrative powers. Every judge of first instance is now required to call once each year an assembly of the justices in each province of his district. But though designed as yet for purposes of instruction only, it requires no gift of prophecy to foresee how these assemblies may ultimately develop into recognized provincial institutions with administrative powers as important in their way as those of their English progenitors. Nay, more, signs are not wanting that the prestige and functions of the individual justice in the Philippines are destined to increase until he becomes the principal official of the *municipio*. Who knows but that the abuses constantly charged against elective municipal officials and the problems connected with Philippine local government may finally lead to, and find a solution in, the elevation to the first place in the municipality of the once humble, but ancient, time honored and widespread office of justice of the peace? In this connection the Filipino people may well ponder the declaration of a contemporary political scientist[1] that "The self-government on which the Anglo-American prides himself owes an incalculable debt to the administrative courts of the justices of the peace as they developed in England."

Future Possibilities

TITLE II

CHARACTER OF THE JUSTICE'S OFFICE.

Remarks of the Author upon Opening the Samar School for Justices of the Peace at Catbalogan, Feb. 28, 1906. *

Officials and Justices of Samar:

I congratulate you upon the auspicious opening of what, so far as I know, is the first school of instruction for justices of

1 Bowman, American Administrative Tribunals, XXI Pol. Sc. Quar. 625.

* This was the first of three assemblies conducted by the author while presiding in the Twelfth Judicial District. It was called pursuant to a previous arrangement with Gov. Curry of Samar, by a circular issued from his office under date of Feb. 6, and altho Act 1450, which first provided for such assemblies, had been passed two days earlier, the news of its enactment had not yet reached that District.

peace in the Philippines. I sincerely hope that, in connection with the important law passed by the commission on the 3rd of the present month, copies of which are distributed to you today, it may mark a new and better era in the history of the justice courts. We will all, I think, agree that there has been great need of reform in these courts. But that need has not been peculiar to the Philippines; it is felt also in the United States. Nor have the evils complained of been due entirely or even largely to individuals. Considering the obstacles under which they have labored, the lack of proper supervision and instruction, the difficulty of procuring complete sets of our laws and of selecting from the mass thereof those that affect these courts—above all the disturbed economic and political conditions of recent years—the marvel is that the justices have done so well.

I desire at this time to call attention briefly to the place and character of these courts and the work that they have to do and to offer some general suggestions about the manner of doing it. First of all they are an integral part of the Philippine judicial system. The justices of the peace form the base of that system just as the Supreme Court forms its apex and the one court is quite as important in its place as the other. Many more people, indeed, are affected directly by the primary courts.

The justice of the peace, as the Attorney General has pointed out (I Op. 108) is not a municipal official in the sense that the president and councilmen are. He is part of an insular system which is entirely separate and distinct, not only from all local officers, but from the executive and law-making branches of the government generally. The justice, therefore, ought, and thanks to the new system of appointment, can, occupy a perfectly independent position. He should ignore all 'partidos" rise above all "disgustos" and be what the law expects of a judicial officer—impartial. This does not mean that you should hesitate for a moment to interfere when the law has been violated, merely because the violators are members or leaders of a "partido". On the contrary you should exercise your power to enforce rights and punish wrongs, regardless of whom it may affect and without fear or favor. But be careful not to become the tool of some designing individual or faction. You can and should be absolutely independent in the performance of your duties, feeling sure that in all right actions you will be supported by your superiors.

The justice of the peace ought to be the protector of the weak and helpless. Yours is essentially the poor man's court, for the great mass of the poor are unable to resort to any other. The strong members of society will generally look after themselves but the real test of any system of justice is the degree in which the rights of the weak are respected. Look well to the interests of the poor and ignorant suitor, listen patiently to his grievances and assist him in preparing the necessary court paper. Be as careful to enforce the rights of the owner of the little nipa house as those of the wealthy *hacendero.*

Finally the justice of the peace ought to be the legal adviser of his community. Most of you live in towns remote from the provincial fiscal and where no lawyer will locate for many years if ever. There should be some official to whom the people can go for information about the laws under which they live and that official is logically the justice of the peace. He should encourage people to come to him for this purpose because it will enable him to prevent litigation and settle many cases out of court, and the justice who does not try to settle cases falls far short of his duty. The former Code of Civil Procedure (Art. 454) required the justice in every case to endeavor to bring about a settlement before entering upon the trial and while that Code is no longer in force the spirit of the article ought still to be observed.

But in order to advise the people intelligently or conduct his court properly the justice must know the law himself and this requires long and patient study. I do not mean that he should take a course like that required of a lawyer for admission, but he should read carefully and understand all acts and decisions relating to his court. I am aware that this has not been very easy for I learn that many of you have not a complete set the Official Gazette or even of the acts of the commision. Besides those acts alone now number nearly 1500, and it no easy task, even for a trained lawyer, to select from them all that are still in force in relation to justices of the peace. For this reason I have found it necessary to prepare for your use during this session a Manual containing these acts as amended, arranged according to subject, with comment on the sections which may need explanation, and, where they have been construed by the courts or the Attorney General, brief notes of these. Typewritten copies of this Manual will be distributed among you to form a

basis of our work at this session and to be taken home at its close for use in your offices.

I desire here to express publicly my thanks to Gov. Curry and the other officials who have assisted me in getting this school under way and with this brief introduction let us commence with the regular work of the session.

TITLE III

ORGANIZATION AND EQUIPMENT.

SITUS

SEC. 1. **Generally.** There shall be courts of justice of the peace as in this section provided:

(a) The existing courts of justices of the peace, established by military orders since the 13th day of August, eighteen hundred and ninety eight, are hereby recognized and continued and the justices of such courts shall continue to hold office during the pleasure of the commission.

(b) In every province in which there now is, or shall hereafter be established, a court of first instance, courts of justices of the peace shall be established in every municipality thereof which shall be organized under "the municipal code," or which has been organized and is being conducted as a municipality when this act shall take effect, under and by virtue of "the municipal code." (Act 136, Sec. 66).

Continuity of Justices' Courts.—On the day following his entry into Manila, General Merritt issued a proclamation reciting, *inter alia:*

"The government established among you by the United States Army is a government of military occupation, and for the present it is ordered that the municipal laws such as affect private rights of persons and property, regulate local institutions, and provide for the punishment of crime, shall be considered as continuing in force so far as compatible with the purposes of military government, and that they be administered through the ordinary tribunals substantially as before occupation, but by officials appointed by the government of occupation." (II Acts Phil. Com., p. 567.)

Subsequently by various orders of the military governor, justices' courts whose functions had been suspended were re-established (Gen. Orders 1899, Nos. 21, 22; 1900 No. 59). With the exception noted below, none of the older justices' courts were abolished. When the Commission came to legislate on the subject, it expressly abolished "existing courts of first instance" (Act 136, Sec. 65) but in the very next section, which is that set forth

above, it expressly "recognized and continued * * * the existing courts of justices of the peace, established by military order." As the terms of Gen. Merritt's proclamation of August 14, 1898, had the effect of continuing all justices' courts the existing tribunals of that grade must be considered as having had, since their first establishment under the Spanish regime, a continuous existence without change of powers or jurisdiction, except as expressly enacted. Their status is entirely different from an office like that of fiscal which, if not actually abolished, was at least not expressly continued, the name alone being retained by the new legislation. (See Willard's Notes to Civil Code p. 27).

In Manila, however, the justices' courts were continued only "until special provisions shall be made by law" (Act 136 Sec. 69). Such provisions were made by Act 183, Sec. 44, which had the effect of abolishing the old courts (U. S. v. Jeng. II Phil. 179; I Off. Gaz. 433) and establishing a new justice's court, which in turn was abolished by Act 1546, Sec. 1, the number of justices, which had previously been two, being thereby reduced to one.

To enforce prohibition of liquor traffic near military reservations the commanding officers (or if the latter are general officers then a field officer) of troops there stationed are vested with the powers of a justice of the peace to act without fees. Prosecutions before them are governed by G. O. 58 and all fines and costs imposed by them accrue to the treasury of the municipality. (Act 709 as amended by Act 1502.)

SEC. 2. **In Provinces, Organized Under Special Act: Ex Officio Justices.** (a) The provincial governor, the provincial secretary, the provincial treasurer, the provincial supervisor and the deputy clerk of the court of first instance for the province are hereby made justices of the peace, *ex officio*, with jurisdiction thruout the province. All fees collected in the province by any provincial officer or deputy clerk of the court of first instance as *ex officio* justices of the peace shall be accounted for to the provincial treasurer and turned into the provincial treasury. (Act 1396 Sec. 22).

These provinces include Benguet, Lepanto-Bontoc, Mindoro, Nueva Vizcaya and Palawan, besides the Moro Province, which is under still another act (No. 787 as amended by 1283.)

Similar provisions as to one or more of these officials had previously been enacted for Lepanto-Bontoc (Act 410 Sec. 5) Mindoro (Act 1131 Sec 1) and Paragua (now Palawan) (Act 1293).

(b) The lieutenant governor of Bontoc and the lieutenant governor of Amburayan shall be justices of the peace *ex officio*, with jurisdiction throughout their respective subprovinces. (Act 1396 Sec. 24 (f.).

The chief of the Culion leper colony division of the bureau of health is hereby made *ex-officio* justice of the peace, with authority to perform all the duties of a justice of the peace thruout the whole of the

Island of Culion. The fees that would accrue to a justice of the peace shall, in all cases where the chief of the Culion leper colony division of the bureau of health acts as justice of the peace, be covered into the insular treasury. (Act 1498, Sec. 2).

SEC. 3. **Same: The Existing Courts** of justices of the peace in provinces organized under this Act are hereby recognized and continued and the justices of such courts shall continue in office during the pleasure of the Philippine Commission, and the establishment of such courts and the appointment of such justices are bereby validated. (Act 1396, Sec. 22).

SEC. 4. **Same: Township Justices.** Courts of justices of the peace may, upon recommendation of the provincial board and with the approval of the Secretary of Finance and Justice, be established in townships organized under the Township Government Act, numbered thirteen hundred and ninety seven, in like manner and with like powers, jurisdiction, and duties as courts of justices of the peace in municipalities organized under act numbered eighty two entitled "the municipal code". (Id. Sec. 22).

Under the Township Government Act (1397 Secs. 18, 36) the municipal president and two councilors constitute a court for trying offenses against municipal ordinances, hearing preliminary investigations and, by consent, civil cases.

SEC. 5. **Same: In Moro Province.** It shall be the duty and within the power of the legislative council: To enact laws for the organization and procedure of local tribal ward courts to consider and decide minor civil actions in which the parties in interest, or any of them, are Moros or members of some other non-Christian tribe, and minor criminal actions in which the accused, or any of them, are Moros or members of some other non-Christian tribe. * * * In each district the governor and secretary of the district shall be justices of tribal ward courts and there shall be as many auxiliary justices as may be needed. The legislative council shall provide for the appointment and compensation of the auxiliary justices, and for the holding of such sessions of the court at such times and places thruout the district as the efficient administration of justice may render necessary. (Act 787, Sec. 13, as amended by Act 1283, Sec. 6 [c].)

These provisions were carried into effct by an act of the legislative council of the province on Oct. 6, 1905. See Rep. of Prov. Gov. Bliss for 1906.

Act 1062 authorizes the appointment of a justice and auxiliary justice for Basilan tho annexed to Zamboanga. Act 1063 gives the justice of the peace of Jolo jurisdiction over the entire Sulu district.

SEC. 6. **Appointment and Term.** One justice of the peace and one auxiliary justice shall be appointed by the Governor General by and with the consent of the Philippine Commission for the city of Manila, for each municipality organized according to the municipal code and for such other towns or places as may be determined by resolution of said Commission. Whenever a vacancy occurs therein, the judge, or judges of the court of first instance of the district shall forward to the Governor General a list of names of persons qualified to fill said vacancy. In preparing said list preference shall be given to any justice of the province who may desire to transfer to another station and whose record entitles him to promotion. The Director of Education shall certify to the Governor General the names of all persons otherwise qualified, who shall have completed the course for magistrates at the Philippine Normal School or University and have expressed their willingness to serve as justices. Appointments shall be made from the lists furnished as above prescribed: *Provided, however,* That in the Moro Province persons so designated by the judge of first instance may assume the duties of justice of the peace while awaiting formal appointment, and shall so continue until such designation is vacated by the Governor General.

In case new municipalities are formed by the Commission the Governor General shall, in the same manner, designate which of the justices and auxiliary justices within the territory so formed into the municipality shall continue in office and the powers of all others therein shall cease. All justices of the peace and auxiliary justices shall hold office during good behavior and those now in office shall so continue. (Act 1627, Sec. 1).

SEC. 7. **Qualifications and Privileges.** No person shall be eligible to appointment as justice of the peace or auxiliary justice unless he shall be (I) at least twenty-three years of age (II) a citizen of the Philippine Islands or of the United States (III) of good moral character, and (IV) able to read and write Spanish or English. He shall be present as often as the business of his court requires, and at least once each business day, at an appointed hour, in his office or at the place where his court is held, but he may, during his incumbency, with the permission of the judge of first instance of the district, pursue any other vocation or hold any other office or position[1], notwithstanding the provisions of Act Numbered One hundred and forty eight. But no justice or auxiliary justice may act as the attorney for any party to a cause commenced in his court or elsewhere except by special permission of the said judge[2]. (Act 1627 Sec. 29).

1 Even under old law a justice could act as deputy provincial treasurer on municipal board of tax assessors. (Op. Atty. Gen.) IV Off. Gaz. 225.

2 *Immunity*—No judge, justice of the peace or assessor shall be liable to a civil action for the recovery of damages by reason of any judicial action or judgment rendered by him in good faith, and within the limits of his legal powers and jurisdiction. (Act. 190, Sec. 9).

SEC. 8. **Disqualification** of the regular justice shall result not alone from the disabilities mentioned in section eight of this Act (One hundred and ninety[1]), but also when he is related within the sixth degree by marriage to either party. In every case of disqualification upon any of said grounds the regular justice shall notify the auxiliary who shall thereupon appear and try the cause, unless he shall be likewise disqualified, or otherwise disabled[2] in which event the cause shall be transferred to the next nearest justice of the peace of the province[3]. (Act 1627, Sec. 8).

1 No judge, magistrate, justice of the peace, assessor, referee, or presiding officer of any tribunal shall sit in any case or proceeding in which he is pecuniarily interested, or related to either party within the sixth degree of consanguinity or affinity, computed according to the rules of the civil law, nor in which he has been counsel, nor in which he has presided in any inferior judicature when his ruling or decision is the subject of review, without the written consent of all parties in interest, signed by them and entered upon the record. (Act. 190, Sec. 8).

2 Judgment by interested justice is void or at least voidable. Whether justice may try one, the commission of whose offense he has witnessed. Quaere. II Op. Atty. Gen. 184; II. Off. Gaz. 866.

3 Disqualification does not arise because justice has allowed *monte* playing in his house (U. S. vs. Navares 1. Phil. 36), nor because he is member of municipal council and accused is president. (1. Op. Atty. Gen. 117).

SEC. 9. **The Auxiliary Justice** of the peace shall have the same qualifications, and be subject to the same restrictions, as the regular justice and shall perform the duties of said office[1] during any vacancy therein, or in case of the absence of the regular justice from the municipality or of his disability or disqualification, or in case of his death or resignation until the appointment and qualification of his successor, or in any cause whose immediate trial the regular justice shall certify to be specially urgent and which he is unable to try by reason of actual engagement in another trial. The auxiliary justice, for such time as he shall perform the duties of justice, shall receive the compensation which would have accrued to the office of justice: *Provided*, That the auxiliary justice of Manila shall receive for the trial of each cause certified to him by the regular justice as above provided, the sum of three pesos, which amount shall be deducted from the salary of the regular justice. (Act. 1627. Sec. 7).

1 Auxiliary should use regular justice's docket. (Op. Atty. Gen.) IV Off. Gaz. 771.

SEC. 10. **Supervision: Reports.** The judge of the court of first instance shall at all times exercise a supervision over the justices of the peace within his district, and shall keep himself informed of the manner in which they perform their duties, by personal inspection whenever possible, from reports which he may require from them, from cases appealed to his court, and from all other available sources. In proper cases he shall advise and instruct them whenever requested, or when occasion arises, and such justices of the peace shall apply to him and not to the Attorney General[1] for advice and instruction, and any such inquiries received by the Attorney General shall be referred by him to the judge of the proper district. In lieu of the report now required by Section 77 of Act 136 each justice of the peace hereafter shall, on or before December first of each year, forward to said judge of the district a report showing the number of suits begun in the court of said justice, during the current year, the nature thereof, whether civil or criminal, the mode of disposition, whether by voluntary dismissal or judgment, the number still pending, the amount of costs and fees collected and for what service, and the number of marriages solemnized. Such report shall be filed in the office of the clerk of the court of first instance, and said judge of the district shall, with the assistance of said clerk, embody a summary of such reports for each province of his district, together with other matters of interest and importance relative to the administration of justice therein, particularly with reference to justice of the peace courts, in a brief report which he shall forward by the close of each calendar year to the Secretary of Finance and Justice. (Act 1627, Sec. 2).

1 Conforms to opinions of Secretary of Justice and Attorney General. IV Off. Gaz. 754, 771.

SEC. 11. **Assembly.** The judge of each judicial district shall hold an assembly of the justices of the peace of each province therein at least once each calendar year at a time and place to be fixed by him, for the purpose of instructing them in their duties, and considering questions relating to the proper administration of their offices. The actual, necessary and reasonable traveling expenses of each justice for necessary travel to and from the place of holding said assembly, not exceeding the maximum fixed by law for similar expenses of municipal presidents, shall be paid by the bureau of justice upon presentation

of proper vouchers. The judge may excuse from attendance any justice who has attended three successive assemblies or who has other sufficient reasons, but unless so excused, the non-attendance of a justice shall justify his suspension or removal. The provincial fiscal shall also attend and assist the judge in conducting the assembly and the clerk of the court shall keep the minutes thereof and preserve a record of the attendance and standing of each justice. After three annual assemblies have been held in a province and the judge is of the opinion that all the justices thereof have been sufficiently instructed, he may defer calling the assembly until further need arises. (Act. 1627, sec. 33).

SEC. 12. **Complaints: Removals.** If at any time the judge of first instance has reason to believe that a justice of the peace is not performing his duties properly, or if complaints are made which, if true, would indicate that the justice is unfit for the office, he shall make such investigation of the same as the circumstances may seem to him to warrant, and may, for good cause, reprimand the justice, or may recommend to the Governor General his removal from office, or his removal and disqualification from holding office and may suspend[1] him from office pending action by the Governor General[2]. The Governor General may, upon such recommendation or on his own motion, remove from office any justice of the peace or auxiliary justice of the peace. (Act. 1627, sec. 32).

1 *Suspension* does not disqualify from being municipal secretary or from voting. (Op. Atty. Gen.) III Off. Gaz., 484.

2 *Effect of Removal.* In all cases where the Civil Governor shall remove any municipal officer or justice of the peace from office he is hereby empowered, in his discretion, to declare such official disqualified thereafter from holding office. Such disqualification may be either special or general, and either temporary or permanent. (Act. 1126, Sec. 2).

EQUIPMENT.

SEC. 13. **Court Room and Supplies.** Each municipality shall provide its justice of the peace with a room in the tribunal, or elsewhere, suitable for holding court, and the necessary furniture lights, and janitor service therefore. All necessary supplies, including stationery, stamps, judicial blanks and the dockets required by law, shall be furnished to each justice by the Bureau of Justice and paid for from funds appropriated for that bureau. The office of the justice of the peace shall always be located in the población, but he may, upon the written request of both parties to a cause, hear the same at any other suitable place in his

municipality and his actual, necessary and reasonable travelling expenses, not exceeding two and one half pesos per day, to and from such place may be taxed as costs in the case. *Provided, however*, That if the trial of more than one of such cases is requested in a particular locality, he shall arrange to try them as nearly as possible at the same time and place and divide the travelling expenses among them proportionately to the time consumed in the trial of each case. (Act 1627, sec. 28).

The justice of the peace of Manila shall be allowed two clerks with salaries to be fixed in the annual appropriation act for said city. (Act 1627, Sec. 6).

SEC. 14. **Dockets: Record.** Every justice of the peace shall keep a well bound book, labeled "Docket"[1], in which he shall enter for each cause, civil or criminal:

1. Title of the proceeding including the names of all parties.
2. Nature of the proceeding, whether civil or criminal, and if the latter, the offense charged.
3. Date of issuing preliminary and *mesne* or intermediate process including orders of arrest and subpoenas and the time of return.
4. Appearance or default of the defendants.
5. Date of presenting the plea, answer or demurrer and the nature of the same.
6. Minutes of the trial, including the date thereof and all adjournments.
7. Names and addresses of all witnesses.
8. Date and nature of judgment, and, if in a civil cause, the amount.
9. An itemized statement of the costs.
10. Date of execution, if one be issued, and copy of the return.
11. Date of filing notice of appeal, if one be filed, and by whom[2].

It shall not be necessary for the justice to take down in writing the testimony of a witness in a cause civil or criminal except of the accused in preliminary investigations, as provided in section two of Act Numbered One hundred and ninety four, as hereby amended, nor shall the justice be required to attend the sessions of the court of first instance except when regularly subpoenaed. But in criminal cases appealed to said court, and in preliminary investigations where the accused is bound over,

the justice shall forward to the provincial fiscal a brief statement of the substance of the testimony[3]. (Act 1627, Sec. 13).

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1 *Title.*—Each justice of the peace shall, at the beginning and in front of all of his entries in his docket, make and subscribe substantially the following, to wit:

"A docket of proceedings in matters civil and criminal before .... , justice of the peace of the municipality of .. .., in the province of..... ... ., in the Philippine Islands.

Witness my signature,

" ... .

Justice of the Peace."

(Act 190 Sec. 70)

Auxiliary justice should use same docket, (Op. Atty. Gen.) IV Off-Gaz. 771.

2 *Preservation.*—Every justice of the peace whose term of office shall expire, or who shall resign, remove from the province, or otherwise go out of office, and the legal representative of every justice of the peace who shall die, shall, within ten days thereafter, deliver his docket, with all process and papers and books relating to his office, to the clerk of the court of first instance of the province; and if any justice of the peace or legal representative of any justice of the peace who shall die, refuse or neglect to deliver such docket, process, papers and books to said clerk as required, he shall be guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding five hundred dollars, or by imprisonment for not more than six months, or by both. (Id., Sec. 71).

3 All other papers should be forwarded to the clerk of the court. (Op. Atty. Gen.) 4 Off. Gaz. 729.

SEC. 15. **Fee Bill.** The following are the legal fees in Philippines Currency to which a justice of the peace shall be entitled:

For each criminal proceeding including preliminary investigations[1]	Five pesos.
Provided that in prosecutions for infractions of municipal ordinances or for nonpayment of the cedula tax the fee shall be	One peso and fifty centavos.
For each civil action	Three pesos.
For performance of marriage ceremony, including issuance of certificate of marriage	One peso.
For taking affidavit	Fifty centavos.
For taking acknowledgment	Seventy five centavos.

For writing and certifying depositions, including oath, per one hundred words, or fractional part thereof	Twenty centavos.
For certified copies of any record, per one hundred words, or fractional part thereof	Twenty centavos.
For stamping and registering books, as required by articles nineteen and thirty six of the Code of Commerce, each book	One peso.

The foregoing fee bill, in Spanish, English and the native dialect commonly spoken in the municipality shall be posted in a conspicuous place in the office of every justice. (Act 1627, Sec. 26).

1 Fee for preliminary investigation is earned tho accused is discharged. (Op. Atty. Gen.) III Off. Gaz. 19.

SEC. 16. **Fee Bill: Exceptions: Liability.** Testimony of witnesses in preliminary investigations and in criminal proceedings shall not be considered as depositions within the meaning of the previous section. *Provided*, That nothing in this section contained shall be construed to require the taking of such testimony in writing except as required in preliminary investigations by section thirteen of this act (see 14 supra). In cases of nonsuit or default the justice shall be entitled to but one-half of the fees provided by this act. In civil actions the fee may be demanded from the plaintiff by the justice in advance and shall be taxed as a part of the costs against the defeated party. In criminal actions the fee shall be paid by the municipality, but shall be taxed as a part of the costs to be paid by the defendant if he be convicted and sentenced to pay the costs. No fee shall be collected from townships organized under act 1397. (Act 1627, Sec 27).

SEC. 17. **Receipts: Restrictions.** Upon receiving payment for any fees, fines or costs, the justice shall execute duplicate, itemized receipts therefor, consecutively numbered, delivering one copy to the person paying, and retaining the other. No justice or auxiliary justice or employee of either of them shall receive any fees or other compensation in connection with his office, except as allowed by this Act nor shall any such justice or employee accept any present or reward in the form of money or other valuable thing from any person who is, or is likely to be, a litigant before such court nor shall he purchase, or otherwise acquire an interest in, any judgment rendered by such justice. (Act 1627, Sec. 31).

SEC. 18. **Audit and Settlement.** All fines and costs imposed by a justice of the peace in criminal prosecutions and all fees charged in civil suits or for any other service, and collected during any month, shall be paid, on the first day of the month succeeding their collection, to the municipal treasurer (in the city of Manila to the Collector of Internal Revenue) to whom, at the same time, the justice shall present a detailed statement of the amounts thus collected by him since his last previous report, and of the amounts accruing to him from the municipal treasury during the same period. His account[1] shall forthwith be audited by the municipal treasurer and president[2] (in Manila, by the Insular Auditor) and he shall thereupon receive from the treasury the amount of his emoluments as allowed by such audit not exceeding for any month the monthly salary allowed by law to the president of the municipality. *Provided*, That in the city of Manila the justice of the peace shall receive, in lieu of all fees, the salary now fixed by law. The auditors above mentioned shall examine the records of the justice of the peace and any other papers or persons deemed necessary, and all mutilated or spoiled receipts must be accounted for and turned in by said justice. But it shall not be necessary for the justice to prove the insolvency of parties who have failed to pay costs taxed against them. If said auditors are of the opinion that needless prosecutions have been instituted for the purpose of enhancing fees, they shall report the facts to the judge of the court of first instance. (Act 1627, Sec. 5).

1 The accounts to be audited include fees in both civil and criminal cases. (Op. Atty. Gen.) III Off. Gaz. 85.

2 Provincial treasurer and deputy may also inspect accounts of justices in checking up municipal treasurer. (Op. Atty. Gen.) III Off. Gaz. 52.

ASSESSORS.

SEC. 19. **General Panel.** Within the first week of January of each year the president and municipal council of each municipality shall prepare a list of residents of the municipality best fitted by education, natural ability, and reputation for probity, to sit as assessors in the trial of actions in courts of justice of the peace. Such list shall contain not less than ten and not more than twenty five names, and shall be made in duplicate, one copy to remain in the hands of the municipal secretary and the other in the office of the justice of the peace. The name of any person

may be stricken from the list, at any time, upon the order of a majority of the municipal council upon its being made to appear that the name ought to be stricken out by reason of the death, permanent disability, or unfitness of the person named; and in case names are so stricken out other names shall be added in their place, to be selected as in this section provided. (Act 190, Sec. 57).

SEC. 20. **Selection by Parties.** Either party to an action may apply in writing to the justice of the peace, who is to try the action, for assessors to sit at the trial. Upon the filing of such application the justice of the peace shall direct that assessors be provided. Thereupon the parties shall be notified forthwith to appear before the justice for the purpose of selecting assessors, who shall be selected from the list provided for in the preceding section, and shall be selected in the following manner in the presence of the justice: The plaintiff shall strike out from the list one name; then the defendant shall strike out one name, and so, alternately, the parties shall strike out names until but two remain on the list. The remaining two shall be the assessors to sit in the action; but if one or more of the two remaining are disqualified by law to sit as assessors, then the justice shall draw one or two names, as the case may be, by lot from those stricken out, and the person or persons thus drawn shall act as assessors, as the case may be. (Id., Sec. 58).

SEC. 21. **Attendance.** The persons so selected as assessors shall, under the direction of the justice of the peace, be summoned to attend and serve as assessors in the action, and a summons for that purpose shall be served in the same manner as other writs or summons. If any person summoned to act as assessor fails, without reasonable excuse, to attend at the trial or at any adjournment thereof, or to continue to serve thruout the trial, he shall be liable under a summary order of the court to a fine not exceeding ten dollars; but the justice may, on reasonable cause shown, excuse from attendance in any particular action any person summoned as assessor, and may, for like cause, discharge from attendance in any action a person who is acting as assessor thereon. In case of any person so excused, the vacancy thus created shall be filled in the manner provided in section fifty eight[1]. (Id., Sec. 59).

1 Preceding section.

SEC. 22. **Compensation.** Each assessor shall receive a compensation of two pesos per day for the actual time by him employed in the trial of the action and in advising the justice as to the

decision thereof, to be taxed as costs against the defeated party, but to be paid primarily by the party demanding the assessors. (Id. Sec. 60).

SEC. 23 **Oath.** Before entering upon the performance of his duties in any action, each assessor shall be sworn by the justice to the faithful and honest performance of his duties as such assessor. (Id. Sec. 61).

SEC. 24. **The Duties of Assessors** when their aid is invoked as herein provided, shall be to sit with the justice upon the trial of the action and to advise him in the determination of all questions of law or fact involved in the case; but the final responsibility for the decision must rest with the justice. If the two assessors shall both be of the opinion that the finding of fact or judgment in any action is wrong, they shall certify in writing their dissent therefrom and their reasons for such dissent, and sign such certification, which shall be filed with the other papers in the action. In case such dissent is filed and the action is appealed, the dissent shall be filed with the other appeal papers in the court of first instance, and that court shall give to the dissent such weight as, in its opinion, it is entitled to. (Id. Sec. 62).

TITLE IV

JURISDICTION[1] AND VENUE.

A. CIVIL

SEC. 25. **In General: Powers.** In all civil actions (including those[2] mentioned in sections 262 to 272 [as hereby amended] inclusive, and Chapter XVIII, of Act 190) arising in his municipality, and not exclusively cognizable by the court of first instance[3], the justice of the peace shall have exclusive original jurisdiction, where the value of the subject matter or amount of the demand does not exceed two hundred pesos, exclusive of interest and costs; and where such value or demand exceeds two hundred pesos, but is less than six hundred pesos, the justice of the peace shall have jurisdiction concurrent with the court of first instance. In forcible entry and detainer proceedings[4] the justice shall have original jurisdiction, but he may receive evidence upon the question of title therein solely for

the purpose of determining the character and extent of possession and damages for detention.

A justice of the peace shall have no jurisdiction to adjudicate questions of title to real estate or any interest therein[5], and whenever a case requiring such adjudication is brought before him it shall be his duty upon discovering the same, to suspend further proceedings therein and certify the cause forthwith to the court of first instance. The jurisdiction of a justice of the peace shall not extend to civil actions in which the subject of litigation is not capable of pecuniary estimation, except in forcible entry and detainer cases[6], nor to those which involve the legality of any tax, impost or assessment; nor to actions involving admiralty or maritime jurisdiction; nor to matters of probate[7], the appointment of guardians[8], trustees, or receivers; nor to actions for annulment of marriage.

A justice of the peace shall have power, anywhere within his territorial jurisdiction, to solemnize marriages[9], administer oaths, take depositions[10] and acknowledgments[11] and authenticate merchants' books as provided by Articles 19 and 36 of the Code of Commerce[12]. (Act 1627, sec. 3).

Moro Province: Tribal Ward Courts. Justices of the peace in the Moro Province shall not have jurisdiction to try civil actions in which the parties, or any of them, are Moros or members of some other non-Christian tribe, or criminal actions in which the accused or any of them are Moros or members of some other non-Christian tribe. * * * Tribal ward courts shall, within the limits defined, * * * have and exercise the jurisdiction now or hereafter vested by law in courts of justice of the peace, but the legislative council may, in its discretion, vest in such courts jurisdiction in other actions, civil or criminal, not capital, original jurisdiction in which is at present vested in courts of first instance. (Act 787, as amended by secs. 6 and 13 of Act 1283).

1 The legal meaning of the word is the power to hear and determine. Jurisdiction of inferior courts like this must always be expressly conferred and proved; it is never presumed.

2 *Replevin* and *attachment*. See *post*.

3 For the jurisdiction of that court see sec. 56 of Act 136; I Op. Atty. Gen. 196.

4 See *post*.

5 *E. g.* an action to redeem land from a pledge or mortgage is not with it the justice's jurisdiction.

6 See I Op. Atty. Gen. 196.

7 See *ante* p. 5, note 8.

8 See II Op. Atty. Gen. 297.

9 **THE MARRIAGE LAW.** SEC. I. Any unmarried male of the age of fourteen years or upwards, and any unmarried female of the age of

twelve years or upwards, and not otherwise disqualified, are capable of consenting to and consummating marriage.

SEC. II. Marriages between parents and children, ancestors and descendants of every degree, between brothers and sisters of the half as well as the whole blood, between uncles and nieces or aunts and nephews, and between stepparents and stepchildren, are incestuous and void from the beginning, whether the relationship is legitimate or illegitimate.

SEC. III. A subsequent marriage contracted by any person during the life of a former husband or wife of such person, with any person other than such former husband or wife, is illegal and void from the beginning, unless:

1. The former marriage has been annulled or dissolved.

2. Such former husband or wife was absent, and not known to such person to be living for the space of seven successive years immediately preceding such subsequent marriage, or was generally reputed and was believed by such person to be dead at the time such subsequent marriage was contracted; in either of which cases the subsequent marriage is valid until its nullity is adjudged by a competent tribunal.

SEC. IV. (Recognizes validity of foreign marriages).

SEC. V. (Provides who may solemnize; includes justice of the peace*).

SEC. VI. No particular form for the ceremony of marriage is required, but the parties must declare, in the presence of the person solemnizing the marriage, that they take each other as husband and wife.

SEC. VII. The person solemnizing a marriage must make and sign a certificate, showing:

1. The real and full names of the parties and their places of residence.

2 Their ages.

3. The consent of the father, mother, or guardian, or of one having the charge of such person, if any such be given, if the male be under the age of twenty years or the female be under the age of eighteen years. For the purpose of ascertaining these facts, the person solemnizing the marriage is authorized to examine parties and witnesses on oath and receive affidavits, and he must state such facts in his certificate. The marriage shall not be performed in case of nonage, unless the consent hereinbefore required shall be personally given by the parent or guardian or person having charge of the infant, or certified in writing over his or her signature, attested by two or more subscribing witnesses and proved by the oath of one of them**.

SEC. VIII. The person solemnizing the marriage must, at the request of either party, make a certified copy of the certificate, and transmit the original to, or file the same with, the justice of the peace of the district within which the marriage is celebrated, * * * within thirty days after the marriage. The written consent to the marriage of a minor shall accompany such certificate. For failing to transmit such certificate or written consent he shall be fined not less than twenty five and not more than fifty dollars.

SEC. XV. The certificates required by the foregoing provisions may be substantially in the following form:

* The fee is ₱ 1. see *ante* sec. 1.

** Nonobservance of this requirement renders justice liable to penalty imposed by Penal Code, Sec. 479. (Op. Atty. Gen.)

Marriage Certificate.

Province of .....

City or town of .....

I do hereby certify that on the .....day of ....., at (the house of ....., or, at .....church) in said (city or town) of ....., A. B., of ....., aged .....years and .....months, and E. D., of ....., aged .....years and .....months, were with their mutual consent lawfully joined together in holy matrimony by me in the presence of M. P., of .....and R. S., of ....., attesting witnesses; and I do further certify that the said A. B. and E. D. (are personally known to me, or, were satisfactorily identified by the oath of W. Z., known to me); that I ascertained, previous to the solemnization of the marriage, that each of said parties was of lawful age to contract the same; (that consent to such marriage was duly given, as required by law by the [father, mother, or person having charge] of the said infant, A. B. and, should both contracting parties be infants, by [the father, mother, or person having charge] of the said E. D.); and that upon the inquiry by me made, there appeared no lawful impediment to the marriage.

Witness my hand, this ..... day of ....., ...

L. M.,

Parish Priest (Rector, Minister of, etc., or Justice or Judge of, etc.)

Witnesses:

.....

.....

Within the foregoing certificate may be included such additional averments as may be required by or be conformable to the rules or customs of particular churches.

Consent to marriage of a person under age.

Province of .....

City or town of .....

This is to certify that I, the undersigned, residing in the (city or town) of ....., Province of ....., (father, mother or person in charge) of A. B., infant, residing in....., ..., hereby freely consent to (his or her) marriage with E. D., of..... ; and that I know of no legal impediment to such marriage.

F. G.,

.....

Witnesses:

Affidavit of witnesses to certificate of consent.

Province of.....
City or town of.....

Before me personally appeared H. I., one of the subscribing witnesses to the foregoing certificate of consent, signed by F. G., who, being by me duly sworn, deposes and says that (he or she) is well acquainted with the said F. G., and knows (him or her) to be the same person who executed the said certificate; and that (he or she) was present and saw the said F. G. sign the same.

Witness my hand this ..... day.....

S. T.,
Notary Public, etc.

Such oath, may be administered by any member of the supreme court, by any judge of the first instance, justice of the peace, notary public, or by the person solemnizing such marriage; or by any person duly authorized by the laws of the place in which the same may be administered. (G. O. 68 as amended by Act 1451).

10 See *post.*

11 By Sec. 127 of Act 496 it is also provided that instruments "affecting lands" may be acknowledged before justices of the peace.

12 By Code of Commerce Sec. 36 merchants must present their books to the justice of the municipality in order that he may note on the first folio of each the number of folios and stamp every sheet with the seal of his court. The fee for this is ₱ 1. per book. See *ante* sec. 15.

B. CRIMINAL

SEC. 26. **To try and sentence.** Justices of the peace, except in the city of Manila, shall have original jurisdiction[1] to try parties charged with misdemeanors, offenses[2] and infractions of municipal ordinances[3], arising within the municipality, in which the penalty provided by law does not exceed six months' imprisonment[4] or a fine of two hundred pesos, or both[5] such imprisonment and fine[6]. (Act. 1627. Sec. 4).

1 The justice cannot refuse to entertain complaints properly presented. (Penal Code Art. 355; cf. Op. Atty. Gen. II Off. Gaz. 929.)

Decision of first instance judge that crime was within justice's jurisdiction is appealable. Fajardo v Llorento IV Off. Gaz. 634.

2 *TABLE of Principal Offenses of which a Justice has Jurisdiction.*

Crime	Article Penal Code	Max. Crim. Grade	Act of Commission	
			No.	Sec.
Abandonment of children, etc.	487 Par. 3	Accomplice .		
Abandonment of public functions	372 Par. 2	Accomplice. .		
		Principal . .		
Abduction . . .	446	Accomplice. .		
Abortion . . .	411	Accomplice. .		
	412 Par. 2	Accomplice. .		
Adultery . . .	437 Par. 1	Accomplice. .		
Allanamiento de Morada . . .	491 Par. 1	Principal . .		
Arson and other destruction of property . . .	552 Par. 2	Accomplice. .		
	555 ref. 553	Principal . .		
	556 ref. 555	Accomplice. .		
	557 No. 1	Principal . .		
	557 No. 2	Accomplice. .		
	557 No. 3	Accomplice. .		
	561	Accomplice. .		
Celebration of Illegal Marriages	475	Accomplice. .		
	477	Principal . .		
Contempt, insults threats against persons in authority, etc.	256	Principal . .		
	257	Principal . .		
Counterfeiting Coin	299 Par. 1.	Accomplice. .	1045	11
Damage	563	Accomplice. .		
	564	Principal . .		
Duelling. . . .	425 Par. 3.	Principal . .		
	427 ref. 425	Principal . .		
	Par 3	Accomplice. .		
	431 No. 1	Accomplice. .		
Estafa	534 No. 1	Principal . .		
	534 No. 2	Principal . .		
	534 No. 3	Accomplice. .		
	535 Nos. 2, 3 and 4 ref. 534 No. 1	Principal . .		
	535 Nos. 2, 3 and 4 ref. 534 No. 2	Accomplice. .		
	535 Nos. 2, 3 and 4 ref. 534 No. 3.	Accomplice. .		

Crime	Article Penal Code	Max. Crim. Grade	Act of Commission	
			No.	Sec.
Estafa	535 No. 5, Par. 2 ref.	Principal		
	534 No. 1			
	535 No. 5, Par. 2 ref.			
	534 No. 2			
	535 No. 5, Par. 2 ref.	Accomplice.		
	534 No. 3	Accomplice.		
	536 ref.			
	534 No. 1	Accomplice.		
	540	Principal		
	541	Principal		
Falsification of documents, etc.	311	Principal		
	312 ref. 303	Accomplice.		
	312 ref. 299	Principal		
	312 ref. 277	Principal		
	312 ref. 269 Par. 2	Accomplice.		
Falsification of seals or marks	277	Accomplice.	1189	123
False testimony	320	Principal		
	322			
Illegal discharge of firearms	408	Accomplice.		
Injuries (physical)	416 No. 3	Accomplice.		
	416 No. 4	Accomplice.		
	416 Par. 2 ref.			
	416 No. 4	Accomplice.		
	419	Accomplice.		
	422 par. 1	Accomplice.		
	422 par. 3	Principal		
Liquor laws, See violation.				
Miscellaneous offenses			7	8
			48	9
			82	23 (b)
			175	20
			310	11,12
			593	11
			597	15
			637	37,38
			774	1
			1148	25,27
			1189	58
			1309	2
			1461	4 (b)
			1480	1
			1499	3
Misdemeanors against property	591	Principal		
Plots to alter prices	543 par. 1	Principal		
	545 ref. 543 par. 1.	Principal		
Public health: offenses against			262	4
			274	2
			309	5,6
			1458	37
			1487	18,20

Crime	Article Penal Code	Max. Crim. Grade	Act of Commission No	Sec.
Public disorders	260	Principal		
	261 par. 1	Accomplice.		
	Idem.	Principal		
	261 par. 2	Accomplice.		
	Idem.	Principal		
	262	Accomplice.		
	263	Principal		
Reckless negligence	568 par. 1	Accomplice.		
	568 par. 2	Principal		
		Principal		
Robbery	508 (without arms; below 125, p.)	Accomplice.		
	511	Principal		
	512 (below 1251 p.)	Accomplice.		
	513	Principal		
	514 ref			
	513 par. 1	Accomplice.		
	514 ref			
	513 par. 2	Principal		
	515 par. 1	Accomplice.		
Seduction and Corruption of Minors	443 par. 1	Accomplice.		
	443 par. 2	Accomplice.		
	443 par. 3	Principal		
	443 par. 4	Principal		
	444	Accomplice.		
Theft	518 No. 2	Accomplice.		
	518 No. 3	Principal		
	518 No. 4	Principal		
	518 No. 5	Principal		
	519 par. 1	Principal		
	519 par. 2	Principal		
	519 par. 3	Principal		
	520 ref. 518 No. 4	Accomplice.		
	520 ref. 518 No. 5	Accomplice.		
	520 No. 1 ref.			
	519 par. 1 and 2	Accomplice.		
	520 No. 2 ref.			
	519 par. 2 and 1	Accomplice.		
	520 No. 3. ref			
	519 pars. 1 and 2	Accomplice.		
Usurpation of functions, etc.	328	Accomplice.		
	220	Accomplice.		
Violation of liquor laws			59	25
			251	3
			709	2
			1369	2

3 Jurisdiction to try parties charged with "infractions of municipal ordinances" was formerly vested in the municipal president. This is now conferred exclusively upon justices of the peace, subject to appeal, and the municipal president no longer possesses *any power to try and sentence.*

4 "The criminal jurisdiction of justices of the peace is extended to all offenses which the Penal Code designates as punishable by arresto mayor in all of its grades," (G. O. 58 Sec. 108).

5 Previous to the passage of Act 1627, justice lacked jurisdiction if *either* fine or imprisonment exceeded the maximum. (Op. Atty. Gen.), III Off. Gaz. 490.

6 *Exceeding Jurisdiction* does not constitute "*arrogacion de atribuciones.*" U. S. v Gonzalez IV Off. Gaz. 533; U. S. v Rallos III Id. 408. See I Op. Atty. Gen. 632.

SEC. 27. **Preliminary Investigations.** Every justice of the peace, including the justice of the city of Manila, shall have jurisdiction to conduct preliminary investigations of all crimes and offenses alleged to have been committed within his municipality and cognizable by courts of first instance but this shall not exclude the proper judge of the court of first instance or of a municipal court from exercising such jurisdiction. The justice of the peace of the provincial capital or of the municipality in which the provincial jail is located, when directed by an order from the judge of first instance [1], shall have jurisdiction to conduct such investigations at the expense of the municipality wherein the crime or offense was committed, tho alleged to have been committed anywhere within the province; to issue orders of arrest, subpoenas and other necessary process therein, which shall run thruout the province; to admit the accused to bail before commitment; to commit or discharge him and otherwise exercise such jurisdiction in accordance with the provisions[2] of Act. 194. (Act 1627, sec. 37).

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1 Formerly this jurisdiction could be exercised by the cabecera justice upon his own motion; now he cannot exercise it without an order from the judge.

2 "In case there shall have been no justice or auxiliary justice of the peace appointed for any municipality * * the president of such municipality is hereby vested with all the powers and jurisdiction conferred on justices of the peace by this Act to make preliminary investigation of criminal offenses charged against persons within the municipality of such president, and shall make such preliminary investigations as justices of the peace are herein required to do, and with like effect, and shall be entitled to the same fees for his services." (Act 194, sec. 3).

This and sec. 123 are the only instances of judicial power retained by the municipal president. The portion represented by * * appears to have been impliedly amended by Act 1627, sec. 8, (*ante* sec. 8) but in case no justices have been appointed for the municipality (which ought seldom to

happen) it seems desirable to have some official on the ground in order to conduct investigations.

In the Moro Province, under Act 8 of the legislative council, the district governor and secretary are given the powers of a justice in preliminary investigations.

SEC. 28. **Contempt Proceedings.** A justice of the peace may summarily impose a fine of not more than ten pesos or a term of imprisonment not exceeding one day, or both, upon any one guilty of misconduct in the presence of the justice or so near as to interrupt the proceedings of his court or in open defiance of his authority[1]; but the party adjudged in contempt may appeal from such sentence and the same shall be stayed as in ordinary criminal cases. (Act. 1627, sec. 12).

1 He may also punish for disobedience of a subpoena. *Post* sec. 189. But see Op. Atty. Gen. IV. Off. Gaz. 770.

SEC. 29. **Venue.** The territorial jurisdiction of a justice of the peace, except in the case of *ex-officio* justices[1] and in other special cases provided by existing law[2], shall be co-extensive with his municipality and the civil process of his court shall not run beyond the same except to summon a defendant impleaded with one who resides and has been served therein or as provided in section 15 of this Act[3]. Forcible entry and detainer actions shall be brought in the municipality where the subject matter thereof is situated. All other proceedings shall be instituted in the municipality wherein a defendant resides or may be served with summons[4]. (Act 1627, sec. 14.)

1 The *ex-officio* justices mentioned in sections 2 and 5 *supra* have jurisdiction thruout the province. See II Op. Atty. Gen. 432.

2 See act 1372.

3 Sec. 38 *infra*.

4 *In the Moro Province*. The jurisdiction of the justices of the peace for the municipality in which such town or place is situated and of the justices of the peace appointed in pursuance of this proviso, shall be concurrent over cases arising within the municipality. The several justices of the peace in any district of the Moro Province shall exercise concurrent jurisdiction over cases arising within the district but without the limits of an organized municipality. Actions, civil and criminal, shall be brought before the justice of the peace who is most convenient of access to the parties, but the justice of the peace first acquiring jurisdiction over any such case shall have exclusive jurisdiction over it. It shall be the duty of the justice of the peace to refuse jurisdiction of any case where the convenience of the parties manifestly requires it to be brought before

another justice of the peace having concurrent jurisdiction. In criminal prosecutions and preliminary investigations before justices of the peace, the cost of the proceeding, including the fees of the justice, shall be paid from such treasury—provincial, district or municipal—as the legislative council of the Moro Province may by law provide. Such provisions shall be as nearly analogous to the provisions of law governing that subject in other provinces as the circumstances and conditions existing in the Moro Province may warrant. (Act 787 as amended by Act 1283, sec. 13).

TITLE V

PROCEDURE.

A. CIVIL

SEC. 30. **Preliminary Process.** Defendants in suits before justices of the peace may be summoned to appear in the manner provided in Articles 704, 705, 706, 707, 708 and 709 of the Code of Civil Procedure of the Philippine Islands, in force in the year 1898, before the American occupancy. They may likewise be lawfully summoned in the manner provided in Chapter XV of this Code. But the time of appearance shall be regulated not by the latter, but by the former code, unless the defendant shall reside more than fifteen kilometers from the población (Act 190, Sec. 51, as amended by Act 1627, sec. 9).

NOTE ON PRELIMINARY PROCESS.

Definition and Nature. The term "process" includes all writs issued in the course of judicial proceedings. Original[1] or preliminary process is the medium by which the defendant in a civil action is officially apprised of its pendency. Such process is the basis of the court's jurisdiction over the defendant[2], and unless the requirements governing it are observed, or the defendant voluntarily appears[3], no subsequent proceedings against him in the case will be valid. In the Philippines these requirements are found either in the Spanish Code of Civil Procedure[4] or the American[5]. These two systems are alike in the main but differ somewhat in details, and the justice is at liberty to follow either[6] in bringing the defendant into court.

Form. The preliminary process in the Philippines consists of a copy of the complaint[7] with a summons attached setting forth the names of the parties, court and province, the time and place of appearance and the admonition that if the defendant fails to appear, judgment will be taken against him by default .

FORM OF SUMMONS[9]

(For caption see note to sec. 31 infra)

To the defendant, Vicente Brillo:

You are hereby summoned to appear before this court in the tribunal of ..... on the ..... day[10] of ..... 19..... at the hour of ..... o'clock ..... m. to answer the accompanying complaint, and if at the time fixed you fail to appear the plaintiff will have the right to ask that judgment be rendered by default and to claim from this court the relief sought in his complaint.

Given under my hand[11] this ..... day of ..... 19.....

.....

Justice of the Peace

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1 "To distinguish it from *mesne* or intermediate process which issues pending the suit upon some collateral or interlocutory matter; as to summon juries, witnesses and the like * * in contradistinction to *final* process or process of *execution*". III Blackstone's Commentaries 279.

2 Mexican Cent. Ry. Co. vs. Pinkney, 149 U. S., 194; 3 Sup. Ct. Rep. 859.

3 Act 190, sec. 397.

4 Articles 704–9.

5 Act 190, Chapter XV.

6 Id. sec. 51 (sec. 30 *supra*). In practice it will probably be found advisable to employ the Spanish method as it has been longer in vogue, is better understood, and is quite as satisfactory from the standpoint of the litigant.

7 Under the American system, while such copy is required, its omission has been held to be a mere irregularity which the defendant waives by failing to make timely objection. Salisbury v. Sands 2 Dill. (U. S.) 276; Millette v. Mehmke, 26 Minn. 306; Munch v. McLaren, 9 Wash. 676. If, however, the summons itself contains no statement of the relief sought it would seem to be fatally defective without the complaint.

8 Spanish Code of Civil Procedure, Arts. 704, 705; Act 190, sec. 392.

9 This, it will be noticed, differs somewhat from Form 40 in sec. 784 of Act 190, but is believed to be better adapted to the justice's court.

10 By the Spanish Code of Civil Procedure, Art. 709, this cannot be less than twenty four hours nor more than six days after issuance of summons unless the defendant resides at a place other than that of the trial, in which case the time may be lengthened according to distance and means of communication. Sec. 392 of Act 190, allowing the defendant twenty days to appear if served within the province and forty if served outside, applies to the justice's court only if the defendant reside more than 15 kilómeters from the población (Act 1627, sec. 9; *supra*, sec. 30).

11 No seal is prescribed for justices of the peace. I Op. Atty. Gen. 107.

An *alias* (additional) summons may be issued at the plaintiff's demand if the original be lost or returned unserved[1].

Service—Kinds. Service of process may be either actual or constructive. *Actual* service consists in the delivery of a copy of the complaint and summons to the defendant himself, when it is called *personal* service, or to someone else for him, in which case it is termed *substituted* service. *Constructive* service is effected by publication as described below, but personal service, even outside of the Philippines, is always equivalent to constructive service[2].

Actual Service is required on each defendant who is a natural person having a known residence in the Philippines, and personal service if he can be found[3]; if not, the copy may be left at his usual place of residence with his nearest relative, member of his household, or servant over the age of 14 years[4], or other occupant of the dwelling, "of sufficient discretion to receive" the writ[5]. In such cases of substituted service the party making it must instruct the recipient to deliver the process to defendant as soon as he returns or to notify him, if his whereabouts are known, under penalty of from fifteen to sixty five pesetas[6].

Same: Special Classes of Defendants. If the defendant is a minor under thirteen, the process must be delivered to his father, mother, or guardian, as well as himself; or if there is none of these, then to the person having his care or control, or with whom he resides or by whom he is employed[7] and whenever the defendant is under guardian, the latter as well as the defendant must be personally served[8]. If the defendant is a private corporation, the process may be delivered to its chief officer or agent or left at his office[9]. If a province or municipality is sued, the secretary (or president if a municipality) may be served[10].

Constructive Service is authorized where defendant's residence is unknown,[11] or defendant is a non-resident of the Philippines, or a foreign corporation having no representative therein who can properly be served and the relief sought consists, partly at least, in excluding such defendant from some lien or interest claimed by him in property within the Philippines, all of which must be shown by affidavit[12]. The publication may be made in

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1 Act 190, sec. 393.

2 Act 190, sec. 399.

3 Spanish Code of Civil Procedure, Arts. 705, 706; Act 190, secs. 396 (6) 394.

4 Spanish Code of Civil Procedure, Art. 252.

5 Act 190, sec. 396 (6)

6 Spanish Code of Civil Procedure, Art. 252.

7 Act 190, sec. 396 (3)

8 Id. Id. (4)

9 Id Id. (1), (2), (6).

Foreign corporations. Secs. 68 (6) and 72 of Act 1459 and sec. 14 of Act 1510 require the designation of an agent by a foreign corporation upon whom all process may be served.

10 Act 190, sec. 396 (5)

11 Spanish Code of Civil Procedure, Art. 708.

12 Act 190, Sec. 398.

a newspaper designated by the justice,[1] or by means of edicts posted at the place of trial and sent to defendant's last known residence.[2]

Service Outside. If the case is one in which the justice has jurisdiction by the location of the *res* or subject matter within his municipality (as in forcible entry and detainer) and a defendant resides in another municipality, the process may be sent to the justice thereof who should cause the service to be made.[3]

By Whom. "The president of the municipality shall serve, or cause to be served, thru the municipal police force, any process issued by the justice of the peace thereof and delivered to said president. Process of the justice may also be served thru the same channels as process from the court of first instance, and civil process, other than executions, may be served by any person designated by the justice for that purpose."[4]

Return. The person who serves the process must return it without delay to the justice who issued it, first indorsing thereon a brief statement of the circumstances accompanying the service. This is technically called his "return". Under the Spanish method the officer must attach a "*diligencia*," signed by himself and the person who receives the writ or witnesses the service, setting forth the name, status, and occupation of the person who received the writ, his connection with the party to be served, and the duty imposed upon such person by the officer. When served thru another justice a "*diligencia*" must be entered at the end of the official comunication which must be returned without delay to the justice who issued it[5]. By the American method, there must be a certificate showing the time, place and the manner of service[6]; and if served by a private individual this must be accompanied by an affidavit that the recitals in the certificate are true[7].

Proof of Service may be made by the signed acknowledgment of defendant[8] or, if he is unable to write, of one who signs at his request, or, if he is not found at his place of residence, of the one with whom the papers were left[9], or, in case of refusal by the party served, of two witnesses called by the person making the service[10]. It may also be proved by the return[11]. Publication may be proved by the affidavit of the printer or his foreman or principal clerk[12].

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1 Act 190, Sec. 399; Spanish Code of Civil Procedure, Art. 708.

2 Spanish Code of Civil Procedure, Art. 708.

3 Id. Art. 707.

4 Act 1627, Sec. 6.

5 Spanish Code of Civil Procedure, Art. 707.

6 Act 190, Secs. 394, 395, 400.

7 Id. Sec. 395.

8 Spanish Code of Civil Procedure, Art. 706; Act 190, Sec. 400 (4). Cf. sec. 397.

9 Spanish Code of Civil Procedure, Art. 706.

10 Id.

11 Act 190, Sec. 400.

12 Id.

PLEADINGS.

SEC. 31. **The Complaint** shall state the name and residence of the plaintiff and that of the defendant, the substance of the claim made, the grounds of action, the amount sought to be recovered, and the date when the claim is presented to the court. (Act 190, Sec. 52).

FORMS. SEC. 784 of Act 190 contains forms of pleadings which "may be used in civil courts in the Philippine Islands."

Following is the prescribed caption for all pleadings in the justice's court:

United States of America, Philippine Islands
In the Court of Justice of the Peace
For the Municipality of .....
Province of .....

Between A. B., Plaintiff, and C. D., Defendant.

Not all of the prescribed forms are adapted to the justice's court. Following are those most likely to prove useful:

Form of complaint to recover money lent.—The plaintiff says that:

1. On the .....day of .....190 .., at ..... he lent the defendant the sum of $ ..... payable on demand (or, on the .....day of.....190.....) with interest on the same from the said .....day of .....190 ..., until payment at the rate of .....per centum per annum.

2. The defendant has not paid the said sum or any interest thereon or any part of the same (except as follows .....).

3. The plaintiff prays judgment for the said sum of $ .... remaining unpaid, with interest from the said .....day of ..... 190 ... , at the above rate, together with the costs of the action.

For money received to plaintiff's use.—The plaintiff says that:

1. On or about the.....day of .....190 ..... , the defendant received $ ..... , (or, a certain bank check or draft upon the bank of ..... amounting to $ .....) from one E. F., for the use of the plaintiff;

2. The defendant has not paid (or delivered) the same.

3. The plaintiff prays judgment for $ .....with interest at .....per cent from the .....day of ... 190 ... , together with the costs of the action.

For goods sold at a fixed price and delivered.—The plaintiff says that:

1. On the ...day of .... 190 ..... at ..... , he sold and delivered to the defendant (here describe the goods sold and delivered).

2. The defendant promised to pay $ ....for said goods on delivery (or, state manner in which payment was to be made).

3. The defendant has not paid the same.

4. (Demand for judgment as in previous forms.)

For goods sold at a reasonable price and delivered.—The plaintiff says that:

1. On the ..... day of .... , 190..., he sold and delivered to the defendant (here state the goods sold and delivered), but no express agreement was made as to price.

2. The said goods were reasonably worth $ .....

3. The defendant has not paid the same.

4. (Demand for judgment as in previous forms.)

For services at a fixed price.—The plaintiff says that:

1. On the ..... day of ...., 190..., the defendant employed plaintiff as a clerk at a salary of $ .... per year (or otherwise employed him, as the case may be).

2. From the said date until the ..... day of ...., 190 .., the plaintiff served the defendant as clerk (or otherwise, as the case may be).

3. The defendant has not paid the said salary (except the sum of $ .. . .).

4. (Demand for judgment.)

For use and occupation at a reasonable rent.—The plaintiff says that:

1. The defendant used and occupied the land (or buildings, located at ... .), belonging to the plaintiff from the ..... day of ..... 190 .., but no agreement was made as to amount of payment for the use of said premises.

2. The use of the said premises for the said period was reasonably worth $ ... .

3. Defendant has not paid the same;

4. (Demand for judgment.)

For carriage of goods. The plaintiff says that:

1. On the .....day of ....190 ..... , the plaintiff at the request of the defendant, carried in his ship (wagons, railroad cars, by hand, or otherwise, as the case may be) certain goods (stating them) from ..... to ....

2. The defendant promised to pay the plaintiff the sum of $.....as freight thereon.

The defendant has not paid the same or any part thereof.

4. (Demand for judgment.)

Payee against maker of promissory note.—The plaintiff says, that:

1. On the .. . . day of .. .., 190 ..., at .... the defendant, by his promissory note, now overdue, promised to pay to the plaintiff $ ... ... on the..... day of ...., 190.... (or ..... days after date);

2. The said note was in the words and figures following: (here copy note);

3. The defendant has not paid the same (except $ .. .. on the ... . days of .... , 190 ..).

4. (Demand for judgment).

First endorsee against maker of note.—The plaintiff says, that:

1. On the ... . day of ... . , 190 ···, at .... the defendant, by his promissory note, now overdue, promised to pay to the order of ... ... $ .... on the ..... day ... . 199.... (or .... days after date).

2. The said .... endorsed the same to the plaintiff.

3. The said note and endorsements are in the words and figures following: (here copy);

4. The defendant has not paid the same;

5. (Demand for judgment.)

SEC. 32. **Demurrer.** The defendant may challenge, orally or by written motion, the jurisdiction of the court over the sub-

ject matter, the plaintiff's capacity to bring the action, or the sufficiency of the complaint on the ground that it fails to state a cause of action. (Act 1627, Sec. 11).

Form (Caption as in preceding forms).

The defendant demurs to (or moves to dismiss) the complaint on the ground* that:

1. The court has no jurisdiction over the subject matter.
2. The plaintiff has no right to bring the action (or is not the real party in interest, or has no capacity to sue).
3. The complaint fails to state a cause of action.

* Only such of these grounds as clearly exist should be included.

SEC. 33. **Answer.** The defendant may interpose any lawful defense orally or in writing[1], but if on appeal it does not otherwise appear, he shall be considered as having interposed a general denial only. A set-off, counterclaim or reconvention, for an amount within the justice's jurisdiction, may also be interposed, but must be in writing and if requested by the defendant[2], the justice shall reduce the same to writing. (Act 1627, sec. 10).

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1 While the law does not specifically require written answers in the justice's court it is the better practice to file them, and, since the issues cannot be changed on appeal, to set forth fully all defenses or counterclaims. See *infra* sec. 43, note 3.

2 The justice should be ready to assist both parties in preparing their pleadings but should be careful to treat them alike and give no undue advantage to either.

Forms: General denial.—The defendant denies each and every allegation in each and every paragraph of the plaintiff's complaint.

More specific answer.—For answer to the plaintiff's complaint the defendant says that:

1. He admits (or denies) the first paragraph;
2. He admits (or denies) the second paragraph, (etc.)
3. For a special defense he says that he paid the claim set forth in the complaint by delivering to the defendant the sum of ₱ ... ... in [cash or goods] on the ..... day of ... ... 19 .. .

Statute of limitations.—For answer to the plaintiff's complaint the defendant says that:

1. He admits each paragraph of the complaint;
2. For special defense the defendant says that the cause of action set forth in plaintiff's complaint did not accrue within . ... years before the filing of said complaint.

A counterclaim (except as to title and other formal parts) may be prepared in the same manner as an original complaint, forms of which are given in the note to sec. 31 *supra*.

SEC. 34. **Adjournment.** Justices of the peace shall have power to adjourn the hearing of an action from day to day as the

interests of justice may require, but shall not have power to adjourn hearings for a longer period than one week[1] for each adjournment, nor for more than three months[2] in all. (Act 190, Sec. 64).

1 A judgment pronounced after an adjournment of more than one week is invalid. *Vega v. Veloso*, Court of First Instance, Leyte, October 1905. Cf sec. 36 *infra*.

2 But it has been held that where an adjournment beyond three months is at defendant's request the justice does not lose jurisdiction. Fischer v. Cooley 39 Neb. 626; 54 N. W. 960.

SEC. 35. **Trial.** The plaintiff may make an opening statement by himself, his agent or counsel, if he so desires, explaining the character of his claim, and the defendant, personally or by his agent or counsel, may make a like opening statement, if he so desires, explaining the character of his defense or counterclaim. Upon the conclusion of the opening statement, the court shall hear the testimony[1] of the plaintiff and his witnesses; afterwards, the testimony of the defendant and his witnesses, all under the sanction of an oath. Upon the conclusion of the testimony in behalf of the defendant, the plaintiff may offer rebutting testimony. When the testimony has been closed, the defendant or his agent or counsel shall be heard in argument, if he so desires, and upon the conclusion of his argument the plaintiff or his agent or counsel shall be heard, if he so desires. (Act 190, sec. 56, as amended by Act 1627, Sec. 10).

1 Note that testimony need not be taken down in writing. *Ante* Sec. 14.

SEC. 36. **Judgment.** At the conclusion of the trial, the justice shall render judgment for the plaintiff to recover such sum as he finds to be justly his due, with costs[1]; or for the defendant to recover his costs, as the law and evidence may warrant. If there is a counterclaim or plea in offset the justice shall render judgment for the sum found in arrear from either party, with costs. But he may adjourn the disposition of the case to a stated day, not exceeding one week[3] from the time of the conclusion of the trial, for the consideration of judgment, if he require time for consideration. (Act 190, sec. 66.)

1 *Costs* are "expenses incurred by a party in the prosecution of a suit" (*Knight v. McMicking*, II Phil. 698; II Off. Gaz. 21.) They are to be distinguished from, but include, *fees* which are "compensation paid to an officer for services" (*Id.*) For Fee Bill see *ante* sec. 15.

In civil cases costs may be demanded by the officer in advance (*ante*

sec. 16) and, as a rule, they are taxed against the losing party (Act 190. sec. 487.)

Items of Costs.

"In an action pending before a justice of the peace, the plaintiff may recover the following costs, and no others:—

For the complaint, one peso.

For the attendance of himself, or his counsel, or both, on the day of trial, one peso.

For each additional day's attendance required in the actual trial of the case, one half peso.

For each witness produced by him, for each day's necessary attendance at the trial, one half peso, and his lawful traveling fees (ten centavos per mile one way "by the nearest route of usual travel". [Act 190, sec. 793.])

For each deposition lawfully taken by him and produced in evidence, five pesos.

For original documents, deeds, or papers of any kind produced by him, nothing.

For official copies of such documents, deeds, or papers, the lawful fees necessarily paid for obtaining such copies.

The lawful fees paid by him for service of the summons and other process in the action.

The lawful fees charged against him by the justice in trying the action. (Act 190, Sec. 491.)

2 Defendant's costs are the same as plaintiff's excluding the first and last items in the preceding note.

3 Under Act 1552 the justice, as well as all other judges, is required to certify on all applications for leave, salary vouchers and pay rolls that all matters in civil and criminal cases which have been under submission for a period of ninety days or more have been decided, unless the same have been resubmitted by written consent of all parties. This, however, is not believed to extend the time here allowed "for the consideration of judgment."

SEC. 37. **Same: Form.** The entry of judgment need not state the facts or conclusions arrived at by the justice, but shall be substantially in the form following only:

"Judgment for the plaintiff to recover.....pesos damages and costs of the action;" or

"Judgment for the defendant to recover his costs," if he shall not be entitled to anything on a counterclaim; or, "Judgment for the defendant to recover.....pesos and his costs," if he shall have established a counterclaim in excess of the demand established by the plaintiff. (Id. sec. 67.)

For mode of proving such judgment see Act 190 secs. 316, 317 and *post* sec. 168.

SEC. 38. **Execution.** If, after fifteen days from the rendition of the judgment, no appeal shall have been perfected as provided

in this Act[1], the justice, at the request of the prevailing party, shall issue upon such judgment an execution which may be enforced by the proper officers[2] in any part of the Philippine Islands. (Act 1627 sec. 15.)

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1 *Post* Sec. 40.

2 See Act 190, Sec. 479.

Form. United States of America Philippine Islands, Province of.. ...

Municipality of .... To the president of said municipality [or sheriff of said (or another) province] and his lawful deputies, greeting:

We command you that of the goods and chattels of ... ... (the defendant) you cause to be made the sum of $ ....damages, together with interest thereon from the date of this execution until the date of payment, at the rate of six per cent per annum; and the further sum of $ .. .. for costs of suit, together with your lawful fees for the service of this execution, all in money of the United States [or insular currency, as the case may be], which .. .., the plaintiff recovered in our court of the justice of the peace for the said municipality on the ... . day of ... . 190 ..., against .. .. [the defendant or plaintiff] for damages, interest, and costs, and that you render the same to the said .... [the plaintiff or defendant], aside from your own fees on this execution, and do you likewise return this writ into court within ... .. . days* from date, with your proceedings endorsed hereon. But, if sufficient personal property cannot be found whereof to satisfy this execution and lawful fees thereon, then we command you of the lands and buildings of the said defendant, to make the said sums of money in the manner required by law, and to make return of your proceedings with this writ within ... . days from date.

Witness my hand this .. .. day of ...., 190 ...

. . ..

Justice of the Peace.

(*Act 190, Sec. 784, Form 43*, as modified for the justice's court.)

See last part of Sec. 71. Act 190 (*ante* sec. 14, note 2.)

Requisites. The execution must be issued in the name of the United States of America, Philippine Islands, sealed with the seal of the court, * * * * and must intelligibly refer to the judgment, stating the court, and the province where the record of the judgment is, and, if it be for money, the amount thereof, and the amount actually due thereon; and if made payable in a specified kind of money or currency the execution must also state the kind of money or currency in which the judgment is payable, and must direct the [officer] or his deputy, substantially as follows:

1. If the execution be against the property of the judgment debtor, it must require the [officer] or his deputy, to satisfy the judgment, with interest, out of the personal property of such debtor, and if sufficient personal property cannot be found, then out of his real property.

* Not less then 10 nor more than 60. (Act 190, sec. 445).

2. If it be against real or personal property in the hands of the personal representatives, heirs, devisees, legatees, tenants, or trustees it must require the [officer] or his deputy, to satisfy the judgment, with interest, out of such property.

(*Note* that subdivision 3 as it appears in the original is inoperative because in conflict with section 5 of the Philippine Government Act of Congress of 1902. Tan Cong v Stewart per Johnson J. June 18, '07.)

4. If it be issued on a judgment made payable in a specified kind of money or currency, it must also require the [officer] or his deputy, to specify the same kind of money or currency in which the judgment is made payable, and payment must be refused in any other kind of money or currency; and in case of levy upon and sale of the property of the judgment debtor, payment from any purchaser at such sale in any other kind of money or currency than that specified in the execution must be refused. The [officer] or his deputy, collecting money or currency in the manner prescribed in this section, must pay to the plaintiff, or party entitled to recover the same, the same kind of money or currency received by him.

5. If it be for the delivery of the possession of real or personal property, it must require the [officer] or his deputy, to deliver the possession of the same, describing it, to the party entitled thereto. It may, at the same time, require the [officer] or his deputy, to satisfy any costs, damages, rents, or profits covered by the same judgment out of the personal property of the person against whom it was rendered, and if sufficient personal property cannot be found, then out of the real property. (Act 190, sec. 444.)

Subjects. All goods, chattels, moneys, and other property, both real and personal, or any interest therein, of the judgment debtor, not exempt by law and all property and rights of property seized and held under attachment in the action, shall be liable to execution. Shares and interests in any corporation or company, and debts, credits, and all other property, both real and personal, or any interest in either real or personal property, and all other property, not capable of manual delivery, may be attached on execution, in like manner as upon writs of attachment. (Act 90, sec. 450.)

Exemptions. The following property shall be exempt from attachment and execution, except as herein otherwise provided:

1. The debtor's homestead, in which he resides, and land necessarily used in connection therewith, both not exceeding in value one hundred and fifty pesos:

2. Tools and implements necessarily used by him in his trade or employment;

3. Two horses or two cows, or two carabaos, or other beasts of burden, such as the debtor may select, not exceeding one hundred and fifty pesos in value, and necessarily used by him in his ordinary occupation;

4. His necessary clothing, and that of all his family;

5. Household furniture and utensils necessary for housekeeping, and used for that purpose by the debtor, such as the debtor may select, of a value not exceeding seventy five pesos;

6. Provisions actually provided for individual or family use sufficient for three months;

7. The professional libraries of lawyers, judges, clergymen, doctors,

school teachers, and music teachers, not exceeding five hundred pesos in value;

8. One fishing boat and net, not exceeding the total value of twenty five pesos, the property of any fisherman, by the lawful use of which he earns his livelihood;

9. Lettered grave-stones.

But no article or species of property mentioned in this section shall be, * * exempt from execution issued upon a judgment recovered for its price. (Id. sec. 452.)

REVIEW

1. Appeal.

SEC. 39. **Right.** Either party to an action before a justice of the peace, may appeal from the judgment of the justice of the peace to the next regular stated term of the court of first instance to be held within the province in which the judgment was rendered in the manner herein provided. (Act 190, Sec. 74).

In the Moro Province an appeal from the tribal ward court is also provided (Act 787 as amended by Act 1283).

SEC. 40. **An appeal in civil causes shall be perfected** by filing with the justice of the peace, within fifteen days after the entry of the judgment complained of, a notice[1] that the party intends to appeal and by depositing with such justice the appellate court docket fee of sixteen pesos and by filing with him a bond[2] in the sum of fifty pesos executed to the adverse party by the appellant and by at least one sufficient surety, conditioned that the appellant will pay all costs which the court of first instance may award against him. In lieu of such bond, the appellant may file with the justice a certificate of the proper official that the appellant has deposited twenty five pesos with the municipal treasurer (in Manila with the Collector of Internal Revenue) and that said sum is available for the satisfaction of any judgment for costs that may be rendered against appellant by the appellate court in said cause. In case judgment is rendered in appellant's favor, the sum deposited in lieu of appeal bond shall be returned to him by the official with whom it was deposited. Judgments rendered by the court of first instance on appeal shall be final and conclusive except in cases involving the validity or constitutionality of a statute or municipal ordinance[3]. (Act 1627, Sec. 16).

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1 *Notice of Appeal: Form: Title of Cause.* The plaintiff (or defendant) hereby gives notice that he intends to appeal to the court of first instance from the judgment rendered in this cause.

2 The court of first instance may review the justice's ruling as to the sufficiency of the bond. Macondray v. Quintero IV Off. Gaz. 603.

3 See sec. 71 *post* note 2.

The justice should explain to the defeated party his rights under this section and assist illiterate parties in preparing the necessary papers.

If essential steps have been omitted so that he cannot grant the appeal he should forward a written statement of the facts to the court of first instance. (Op. Atty. Gen. III. Off Gaz. 579).

SEC. 41. **Transcript.** The justice of the peace, upon the perfection of the appeal, shall prepare and certify his record to the following effect, viz:

"Copy of the record of the proceedings before....., a justice of the peace of the municipality of....., in the province of....., in the case herein set forth, towit: (Here copy the entries on the docket and certify as follows, viz:)

"Philippine Islands, Province of....., I, ... a justice of the peace of the said province, certify that the foregoing is a copy of the record and proceedings before me in the case stated therein as appears on my docket.

"Given under my hand this.....day of .....A. D.....

"Justice of the Peace."

(Act 190, Sec. 77).

SEC. 42. **Transmittal.** The justice of the peace from whose decision an appeal is taken, shall, within five days after the perfection of said appeal, transmit to the clerk of the court of first instance for the province a certified copy of the docket entries together with all the original papers and process in the case, and the original appeal bond or certificate of deposit in lieu thereof together with the appellate court docket fee[1], upon receipt of all of which the clerk shall docket the cause in the court of first instance, and the same fees shall thereafter be charged upon such appeal, as in suits originating in said court. (Act 1637 sec. 38).

1 The Clerk of the court of first instance may demand his docket fee in advance regardless of whether the appellant is plaintiff or defendant (Knight v McMicking, II Phil. 698, II Off. Gaz. 21); if successful, the appellant should recover his costs.

SEC. 43. **Effect.** A perfected appeal shall operate to vacate[1] the judgment of the justice of the peace, and the action when duly entered in the court of first instance shall stand for trial *de noro*[2] upon its merits in accordance with the regular procedure in that court, as though the same had never been tried and had been originally there commenced.[3] (Act 190, Sec. 75).

1 Cruz v Joaquin II Phil. 503. Court of first instance cannot base its judgment upon justice's proceedings. Reyes v Alburo V Off. Gaz. 147.

2 So in appeals from judgments of tribal ward courts in the Moro Province (Act 787 as amended by Act 1283, sec. 6).

3. IDENTITY OF ISSUES ON APPEAL.

The cause of action cannot be changed in the appellate court[1]. This rule obtains in certain other jurisdictions[2] where, as in the Philippines, it originated not by force of statute but in judicial decisions which ought, therefore, to be equally applicable here.

Exemplifications: Affirmative Defenses. Thus, under the general rule above stated, an affirmative defense[3], much as payment or want of consideration[4], forgery[5], or the statute of limitations[6], cannot be raised for the first time in the appellate court.

What Constitutes a Change of Issues. Setting up a verbal contract instead of a statutory right is a change of issues within the meaning of this rule[7]. So is suing on a written warranty in the appellate court if the action below was on an account[8].

Counterclaims, etc. By virtue of this doctrine a counterclaim or set-off not presented in the lower court is excluded from consideration on appeal[9].

Parties. Where the complaint in the justice's court alleged services rendered to a partnership and that in the appellate court claimed compensation from other parties, it was held that the issues were changed[10]. But the mere fact that the parties on appeal are different from those named in the summons from the lower court is not fatal, if amendment was in fact duly made in that court[11]. So it is not a violation of the rule to omit, on appeal, one of several parties defendant below[12].

Qualifications of the Rule: New Pleadings Permitted. In the absence of a different showing in the appellate court it will there be presumed that the defense presented by defendant below was at least equivalent to a general denial[13]. Hence it is permissible for him to file such pleading on

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1 Alonso v Placer, IV Off. Gaz. 223; Enriquez v A. S. Watson & Co., Id. 446; Evangelista v Tabayuyong V Off. Gaz. 280.

2 People v El Dorado County Court 10 Cal. 19; Inglehart Lull (Neb.) 90 N. W. 762; 95 Id. 25. See 31 Cent. Dig. Col. 1746-7; 1755-7.

3 Bishop v Stevens, 31 Neb. 786; 48 N. W. 827.

4 Lee v Walker, 35 Neb. 689; 53 N. W. Rep. 597.

5 1st Nat. Bank v Carson, 30 Neb. 104; 46 N. W. 276.

6 Halbert v Rosenbahn, 49 Neb 498; 68 N. W. 625.

7 Robertson v Hamilton, (Neb.) 86 N. W. 493.

8 Fuller v Schroeder, 20 Neb. 631; 31 N. W. 109.

9 Darner v Daggett, 35 Neb. 695; 53 N. W. 608; O'Leary v Iskey 12 Neb. 136; 10 N. W. 576; Evangelista v Tabayuyong V Off. Gaz. 280.

10 Jacob North & Co., v Angelo, (Neb.) 105 N. W. 1089.

11 Hartzell v McClurg, (Neb.) 74 N. W. 625.

12 Lamb v Thompson 31 Neb. 448; 48 N. W. 58.

13 See *ante* sec. 33; Carr v Luscher 35 Neb. 318; 53 N. W. 144, holding however, that nothing more would be presumed.

appeal though none was presented below[1]. In jurisdictions where a reply is required in the appellate court but not in the lower court plaintiff may, of course, file such reply for the first time on appeal[2].

Language of Pleadings Need Not Be Identical. The rule does not go to the extent of requiring that the party state his cause of action or defense in precisely the same language on appeal as in the lower court[3]. Thus the statement of the cause of action may be particularized in the appellate court without changing the issues[4]. And where, in an action of replevin, an averment of conversion was added on appeal, it was held not to infringe the rule[5].

Enlarging Claim, etc. On a principle somewhat similar to that last mentioned, it has been held permissible to increase, in the appellate court, the amount claimed as damages, the breach of the same contract being alleged[6]. But the amount as thus amended must not exceed that which would have been cognizable by a justice of the peace[7]. The evidence need not, of course, be the same in both courts[8].

Enforcement: Remedy. In order to avail himself of the benefits of this rule the party prejudiced by its infraction must move to strike from the pleading the new issues as soon as they are presented; he cannot wait until the trial and then insist on the exclusion of evidence in support thereof[9]. This rule is, of course, inapplicable where, as the law permits[10], the party relies upon his pleadings in the lower court and no new pleadings are presented on appeal[11].

Proof of Infraction. While the record should always be resorted to for the purpose of determining what were the issues below and whether they have been changed, there is well considered authority for the proposition that, if the record fails to disclose such information, parol evidence is admissible on the point in question[12].

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1 Mullins v So. O. St. Ry. Co. (Neb.) 99 N. W. 521.

2 C. B. & Q. R. Co. v Gustin (Neb.) 52 N. W. 844.

3 Brockway v Reynolds, (Neb.) 109 N. W. 154 and cit.

4 German Nat. Bank v Aultman, (Neb.) 88 N. W. 479; Levi v Fred 38 Neb, 564; 57 N. W. 386; Citizens' State Bank v Pence 59 Neb. 579; 81 N. W. 623.

5 Livingston v Moore, (Neb.) 89 N. W. 289.

6 Piano Mfg. Co. v Nordstrom, (Neb.) 88 N. W. 164.

7 U. P. R. Co. v Ogilvy 18 Neb. 638; 26 N. W. 464.

8 Sells v Hapgood 21 Neb. 360; 32 N. W. 66.

9 Grainger v Bank 88 N. W. 121; Levi v Fred 38 Neb. 564; 57 N. W. 386; Lee v Walker 35 Neb. 564; 53 N. W. 597; Robertson v Bank 40 Neb. 235; 58 N. W. 715; Sawyer v Brown 17 Neb. 171; 22 N. W. 355.

10 Sec. 45 *infra*.

11 Fitzgerald's Estate v Bank (Neb.) 90 N. W. 994.

12 Inglehart v Lull (Neb.) 90 N. W. Rep. 762; (on rehearing 95 Id. 25) which contains an exhaustive review of the authorities in the particular jurisdiction involved as well as a valuable discussion of the point on principle

SEC. 44. **Settlement.** At any time after the perfection of an appeal from a judgment of a justice of the peace, and before the papers have been transmitted to the clerk of the court of first instance to which the action is appealed, the parties may adjust the controversy by agreement in writing, signed by both parties and lodged with the justice of the peace, who shall enter the same upon his docket, and no further proceeding shall thereafter be taken in the action. But if the appeal papers have already been transmitted to the clerk of the court of first instance, then the justice shall immediately transmit the compromise agreement to the clerk of the court of first instance, who shall file the same and enter a memorandum thereof upon his docket, and no further proceedings shall thereafter be taken in the action. (Id. sec. 79).

SEC. 45. **Procedure on appeal.** When a perfected appeal from a judgment of a justice of the peace has been duly entered in the court of first instance, new pleadings shall be filed in the action in that court, and the pleadings in such action shall be in all respects governed by the same rule as though the action had been originally commenced in the court of first instance[1]. But the plaintiff may, if he so elect, rely upon his complaint as originally filed before the justice of the peace, instead of filing a new one. (Id. sec. 112).

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1 See note to sec. 43 *supra*.

2. Certiorari.

SEC. 46. **In General.** When the ground of the complaint in an action in a court of first instance is that an inferior tribunal, board, or officer exercising judicial functions, has exceeded[1] the jurisdiction of such tribunal, board, or officer, and there is no appeal, nor any plain, speedy, and adequate remedy, and the court, on trial, finds the allegations of the complaint to be true, it shall render a judgment ordering such inferior tribunal, board, or officer, or other person having the custody of the record or proceedings, at a specified time and place, to certify to the court a transcript of the record and the proceedings (describing or referring to them with convenient certainty), that the same may be reviewed by the court; and requiring the party, in the meantime, to desist from further proceedings in the matter to be

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1 *Note* that this applies to the justice only where the *has exceeded* his jurisdiction, not where he has merely erred in exercising it.

reviewed, if, in the judgment of the court, a stay ought to be granted (Id. sec. 217).

SEC. 47. **Service.** A certified copy of the judgment and order of the court, as provided in the preceding section, shall be served upon such inferior tribunal, board, or officer in such manner as the court may direct. (Id. sec. 218).

SEC. 48. **Enforcement.** If such order is not obeyed, the court may enforce it by attachment and by fine and imprisonment as for contempt. (Id. sec. 219).

SEC. 49. **Final Proceedings** When the proceedings complained of have been fully certified, the court shall hear the parties and determine whether the inferior tribunal, board, or officer has regularly pursued its authority; and if it finds that such inferior tribunal, board, or officer has not regularly pursued its authority, it shall thereupon give final judgment, either affirming, or annulling, or modifying the proceedings below, as the law requires. But costs shall not be adjudged against a justice of the peace in such a proceeding unless the court shall find that in exceeding his jurisdiction he acted in bad faith. (Act 190, sec. 220 as amended by Act 1627, sec. 18).

SEC. 50. **Transmittal of Judgment.** A copy of the final judgment, signed by the clerk, shall be transmitted to the inferior tribunal, board, or officer having the custody of the record or proceedings certified up. (Act 190, sec. 221).

3. Relief on Equitable Grounds.

SEC. 51. **When Granted.** When a judgment has been rendered by a justice of the peace, or any other subordinate tribunal, and any party to the action has been unjustly deprived of his day in court and an opportunity to be heard thereon, by fraud, accident, mistake, or excusable negligence, or has been prevented from entering an appeal from such judgment by fraud, accident, mistake, or excusable negligence, the court of first instance may, in its discretion, and on reasonable terms, reverse and set aside the judgment so rendered, and hear and determine the action and make the necessary orders therein, as if the same had been brought to the court of first instance by appeal, provided the party so aggrieved shall make application, as hereinafter provided, to the court of first instance, and within sixty days after he first knows that such judgment has been rendered against him.

This section shall be liberally construed so as to prevent injustice. (Id. sec. 148).

SEC. 52. **Procedure.** The person aggrieved by a judgment obtained in the manner stated in the preceding section may, within the time therein limited, file his complaint in the court of first instance of the province in which the original judgment was rendered, stating the fact of the rendition of such judgment and the circumstances constituting the fraud, accident, mistake, or excusable negligence relied upon as ground for relief and praying that such judgment may be reversed and set aside and the cause be determined upon its merits. The party against whom the complaint is made shall be served with notice as in other actions pending in the court of first instance, and the trial shall proceed as in other actions in that court. If the court shall find that the facts set forth in the complaint are true and that the complainant is entitled to relief, the judgment complained of shall be reversed and set aside, and shall thereafter be of no validity, and the court shall proceed to hear and determine the action upon its merits, and make the necessary orders therein, as if the same had been regularly brought to said court by appeal. (Act 190, sec. 149).

SEC. 53. **Temporary Injunction.** At the time of filing such complaint, or at any time thereafter before final hearing, the judge of the court of first instance in which the action is pending, may grant an injunction restraining the party in whose favor such judgment has been rendered, his agents and attorney and the justice of the peace or other inferior tribunal rendering the judgment, from any further proceedings to enforce the same until the further order of the court in the premises, which injunction shall be served in the manner provided by law for serving process; but the judge issuing such injunction shall, before issuing it, take from the party, upon whose application the same is granted, an obligation to the other party, with sufficient sureties, to be approved by the judge, conditioned that if the complainant fails to prosecute his complaint to effect, or finally to recover in such action, he will pay the adverse party the intervening damages and costs accruing to him by reason of the issue of such injunction, together with the amount of the original judgment, but such injunction shall not operate to discharge or release bail nor extinguish any lien which the party enjoined has acquired upon the property ot the plaintiff by attachment or levy of execution. The damages, if any, accruing under this

section shall be assessed by the judge and included in his final judgment in the action. (Id. sec. 150).

SEC. 54. **Final Judgment.** If the plaintiff shall prevail in such action, the original judgment shall be reversed and vacated, and the defendant therein and the justice of the peace or other inferior tribunal that rendered the judgment shall be perpetually enjoined from any further steps to enforce the same. The costs of such proceedings shall be awarded in the discretion of the court, in such manner as justice requires. (Id. sec. 151).

SEC. 55. **Attendance of Justice.** Upon the trial of an action instituted in pursuance ot the four preceding sections, the justice of the peace[1] or other subordinate magistrate or official who rendered the judgment complained of, shall attend and produce before the court all the papers in the original action, if required to do so by the judge. (Id. sec. 152).

1 He can only be so required by process regularly issued. See *ante* sec. 14.

B. CRIMINAL.

SEC. 56. **Complaint.** Except as otherwise provided by law, criminal proceedings before a justice of the peace must be commenced by complaint[1] under oath setting forth the offense charged with such particulars as to time, place, person, and property as may be necessary to enable the defendant to understand distinctly the character of the offense charged and to answer make thereto. Complaints for the infractions of municipal ordinances, or for non-payment of cedula tax, must be indorsed "approved" by the municipal president.[2] (Act 1627 sec. 39).

1 Justice cannot proceed without complaint (II Op. Atty. Gen 336) tho he has personal knowledge of the offense. (Op. Atty. Gen. III Off. Gaz. 490). His refusal to entertain a complaint renders him liable under Penal Code sec. 355 (Id. 929).

Either fiscal or complainant may present complaint; if justice refuses to issue warrant, remedy is not appeal but direct application to judge of first instance. II Op. Atty Gen. 129.

The form of the written complaint may be substantially as follows:

"The United States against A. B.

"....., justice of the peace for the municipality of ...., Province of ....., the ..... day of ....., 190 ...

"A. B. is accused by the undersigned of the crime of (giving its legal appellation, such as murder, arson, robbery, or the like) committed as follows:

"That the said A. B. on the ..... day of ..... 190 . at the ..... of ..... Province of ..... (here set forth the acts or omissions charged as an offense), contrary to the statute in such case made and provided.

"(Signed .....)"

(Act 194. sec. 1). (Oath)

2 *For Failure to Register Cattle.* "Complaints for the prosecution of an offense under Act 1147 must be indorsed 'approved' by the treasurer of the province or his deputy, both of whom shall have power, without such prosecution, to receive the fees and minimum fine provided by said Act". (Act 1627, sec. 40).

SEC. 57. **Order of Arrest.** It shall be the duty of every justice of the peace, when written complaint under oath has been made to him that a crime has been committed within his municipality[1] and there is reason to believe that any person has committed the same, which complaint the justice believes to be well founded, or when he has knowledge of facts tending to show the commission of a crime within his municipality by any person, to issue an order for the arrest of the accused and have him brought before the justice of the peace for such preliminary examination[2].

The order of arrest shall be directed and delivered to any officer[3] authorized by law to make arrests, signed by the justice of the peace, shall contain the name of the accused, if known, and the offense with which he is charged[4]. (Act 194 sec. 1).

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1 For the jurisdiction of the cabecera justice see *ante* sec. 27 (Act 194, sec. 1).

2 While this and the sections immediately following were enacted primarily for preliminary investigations they are for the most part applicable to cases where the justice has jurisdiction to try and sentence. *E. g.* the form contained in the note to the preceding section is the same as that prescribed in G. O. 58, sec. 8 for ordinary prosecutions. It is believed that all of these forms and most of the rules of procedure here prescribed can safely be followed by the justice in both classes of criminal proceedings.

3 In addition to those mentioned in the note to sec. 30 *ante*, the warrant may be served by one of the constabulary (Act 175, Sec. 6).

4 "*The form* of the order of arrest may be substantially as follows:

"To any lawful officer, greeting:

"You are hereby commanded to arrest (giving the name of the accused), who stands charged before me with the crime of (stating the nature of the offense charged) and to bring him before me as soon as possible to be dealt with as the law directs. This ..... day of ..... , 190..

'(Signed by the name of the justice of the peace.)'

Neither the complaint nor order of arrest, however, shall be void because of any mere informality or failure to follow the above forms." (Act 194, sec. 1).

SEC. 58. **Same: Service.** It shall be the duty of the officer to whom the order of arrest is delivered to arrest the accused forthwith and bring him before the justice of the peace as directed in the order. (Act 194, Sec. 1).

SEC. 59. **Same: Outside Province.** Criminal process may be issued by the justice, to be served outside his province[1], when the judge of first instance of the district, or in his absence the provincial fiscal, shall certify that in his opinion the interests of justice require such service. (Act 1627, Sec. 30).

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1 Torrente v. Grove, IV Off. Gaz. 72. The foregoing section was intended to safeguard the power declared by this decision.

SEC. 60. **Hearing.** When the accused is brought before the justice of the peace it shall be his duty to inform the accused of the charge, give him an opportunity to examine the complaint and the affidavits, if any, of all other witnesses in support thereof. The justice of the peace shall thereupon demand of the accused whether he pleads guilty or not guilty to the charge. If he should plead guilty then it shall be the duty of the justice of the peace to order that the accused be remanded to jail for safe keeping, to await the action of the judge or court of first instance, or give bail in an amount to be fixed by the justice of the peace, with sufficient sureties, for his appearance before the judge or court of first instance, if the case be a bailable one as provided in General Orders Number 58 of the Military Governor, series of nineteen hundred[1]. If the accused shall deny his guilt then it shall be the duty of the justice of the peace to make preliminary investigation of the charge as speedily[2] as may be consistent with right and justice, but in any event he must begin such investigation within three days of the time the accused was brought before him, unless the accused or complainant shall ask for delay in order that witnesses may be obtained, or for other good and sufficient reason, in which event a continuance for a reasonable time may be allowed. All witnesses, including the complainant shall be examined under oath. The witnesses offered on behalf of the government or complainant shall be first examined and then those offered on behalf of the accused, who

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1 *Post* sec. 61.

2 So where the justice has jurisdiction to try and sentence. (Phil. Gov. Act sec. 5). The practice of keeping prisoners long in jail *awaiting a hearing* should be avoided.

shall be present at every stage of the proceeding. The investigation shall be public and the witnesses shall be examined in the presence of the accused, who shall have a right, either in person or by counsel, to cross-examine them if he so desires. The witnesses shall be examined separate and apart from each other if either party demands it. Upon conclusion of the evidence of the other witnesses, the accused may testify under oath, if he so desires, in which case he may be cross-examined as any other witness. His evidence shall be reduced to writing[1] and signed by him. If he refuses to sign the same, that fact shall be certified by the justice of the peace with the reason for such refusal given by the accused. But the accused shall not be compelled to testify against his wishes and the justice of the peace shall so inform the accused before he begins his evidence. In the event the accused declines to testify as a witness, that fact shall not be considered as evidence against him. Upon the conclusion of the preliminary investigation, if the justice of the peace is of the opinion that there is reasonable cause to believe that an offense has been committed and that the accused is guilty thereof, he shall so declare and shall adjudge that the accused be remanded to jail for safe keeping to await the action of the judge or court of first instance, unless he give bail for his appearance if the case is bailable, as provided in General Orders No. 58[2]. On the other hand, if the justice of the peace be of the opinion that no crime has been committed, or that there is no reasonable ground to believe the accused guilty thereof, the justice of the peace shall order the discharge of the accused. Such discharge, however, shall not operate as a final acquittal of the accused, but he may be again arrested and prosecuted for the same offense. (Act 194 sec. 2 as amended by Act 1627 sec. 13.)

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1 Note that this is the only testimony in either criminal or civil cases that need be written down. Even when so written it is no part of the record and is not admissible in trials in the court of first instance "except in the cases mentioned in the statute" (G. O. 58 sec. 59). U. S. v Capisonda, 1 Phil. 575.

2 *Post* sec. 61.

BAIL.

SEC. 61. **Before Conviction.** *Be it enacted by the Senate and House of Representatives of the United States in Congress assembled:*

That all persons shall, before conviction, be bailable by sufficient sureties, except for capital[1] offenses. * * *

That excessive bail shall not be required. (Philippine Gov. Act sec. 5; *cf.* G. O. 58, sec. 53; Act 190, sec. 542.

1 If the offense is one that might be capital, or where doubt arises whether it is capital, the justice should not grant bail but in all such cases as well as where the accused is unable to give bail he should be sent at once to the provincial jail.

SEC. 62. **Pending Appeal.** After judgment by a justice of the peace, the defendant shall be admitted to bail as of right and in all non-capital cases, after judgment by any other court, as a matter of judicial discretion. The appellate court may grant, bail even after refusal by the lower court (sec. 64, of G. O. 58 as amended by Act 1627, sec, 35).

"*Bail Upon Appeal* must conform in all respects as provided for in other cases of bail, except that the undertaking must be conditioned as prescribed in section sixty five[1]." (G. O. 58, sec. 73).

1 Next section.

SEC. 63. **Terms.** If the offense is bailable, the defendant may be be admitted to bail, before conviction, to answer to the complaint or information in the court in which it is filed or to which it may be transferred for trial; after appeal, upon application supported by an undertaking of bail that he will pay such fine as the appellate court may direct, or will surrender himself in execution of such judgment as the apellate court may render, or that, in case the cause is remanded for a new trial, he will appear in the court to which it may be remanded and submit himself to the orders and processes thereof. (G. O. 58, sec. 65).

SEC. 64. **Deposit in Lieu of Bond.** At any time after the amount of the bail is fixed by order, the defendant, instead of giving bail, may deposit[1] with the nearest collector of internal revenue the sum mentioned in the order, and, upon delivery to the court a proper certificate of the deposit, must be discharged from custody. Money thus deposited shall be applied to the payment of the fine and costs for which judgment may be given, and the surplus, if any, shall be returned to the defendant. (Gen. O. 58, sec. 74).

1 Municipal treasurer as deputy of provincial may receive such deposit. (Op. Atty. Gen. IV Off. Gaz. 473).

SEC. 65. **Bail by Fiscal.** In the absence of the judge of first instance from the province, the provincial fiscal shall have authority to grant bail in a proper case, after commitment to the provincial jail, subject to review by said judge. (Act. 1627, sec. 36).

SEC. 66. **Form.** All personal bail bonds must be executed by a written undertaking executed by at least two sufficient sureties (with or without the defendant, as the court in its discretion may demand) and duly acknowledged, in substantially the following form:

"A complaint (or information) having been filed on the ..... day of ...., 19 ... in the court of .... , ..., Province of ...., charging (name of defendant) with the offense of (designating it generally), and he having been admitted to bail in the sum of ₱ .... pesos:

"Now, therefore, we .. .. and ...., of ...., jointly and severally, hereby undertake that the above (naming the defendant) will appear and answer the charge above mentioned in whatever court it may be tried, and will at all times hold himself amenable to the orders and process of the court, and if convicted will appear for judgment, and render himself to the execution thereof; or if he fails to perform any of these conditions, that he will pay to the United States the sum of ₱ . ... pesos (inserting the sum to which the defendant shall be admitted to bail).

(Signed) " ....
" ....
" ....

(G. O. 58, sec. 67).

SEC. 67. **The Necessary Qualifications of Sureties** to a bail bond shall be as follows:

1. Each of them must be a resident householder, or freeholder within the Islands.

2. Each must be worth the amount specified in the undertaking over and above all just debts, obligations, and property exempt from execution; but the court may allow more than two sureties to justify severally in amounts less than that expressed in the undertaking, if the entire sum justified to is equivalent to the whole amount of bail demanded. (G. O. 58, sec. 68).

SEC. 68. **Justification.** The sureties must in all cases justify by affidavit taken before the magistrate[1], stating therein that they each possess the qualifications named in the preceding section. (G. O. 58, sec. 69).

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1 Sureties cannot justify before notary public. (Op. Atty. Gen.) III Off. Gaz. 590.

SEC. 69. **Additional Examination.** The court may further examine the sureties upon oath concerning their sufficiency, in such manner as it may deem proper. (G. O. 58, sec. 70).

SEC. 70. **Discharge.** The defendant must be discharged by the court upon its acceptance of bail. (G. O. 58, sec. 71).

SEC. 71. **Appeal.** The convicted party may appeal from any final judgment of a justice of the peace in a criminal cause to the court of first instance by filing a notice[1] of appeal with such justice within fifteen days after the entry of judgment. Upon such notice being so filed, the justice shall forward to the court of first instance all original papers and a transcript of all docket entries in the cause, and the provincial fiscal shall thereupon take charge of the cause in behalf of the prosecution. The judgment of the court of first instance in such appeals shall be final and conclusive except in cases involving the validity or constitutionality of a statute or the constitutionality of a municipal or township ordinance[2]. (G. O. 58, sec. 43 as amended by Act 1627, sec. 34).

1 See note to sec. 40 *ante* for form of notice.

2 Question whether former Code of Criminal Procedure has been repealed does not involve "constitutionality of statute." U. S. v. Sy-tay, 1 Phil. 35.

Where interpretation, only, is in question appeal does not lie. U. S. v. Que Bing, IV Off. Gaz. 690. No other question than validity or constitutionality can be considered. Trinidad v. Sweeney, III Off Gaz. 603.

In the Moro Province "the sentence of the tribal ward courts from which no appeal is taken to the court of first instance may be modified or remitted by the provincial governor after a review of the case." (Act 787 as amended by Act 1283, Sec. 6. (c).)

SEC. 72. **Trial on Appeal.** All cases appealed from a justice's court shall be tried in all respects anew[1] in the court to which the same are appealed; but on the hearing of such appeals it shall not be necessary, unless the appeal shall involve the constitutionality or legality of a statute, that a written record of the proceedings be kept: but shall be sufficient if the appellate court keeps a docket of the proceedings in the form prescribed.[2] (G. O. 58, Sec. 54).

1 Court may permit filing of new complaint if it relates to the same criminal act. Andres V. Wolfe IV Off. Gaz. 222.

2 *Ante* sec. 14.

TITLE VI

SPECIAL ACTIONS AND PROCEEDINGS[1]

1. Forcible Entry and Detainer.[2]

SEC. 73. **Grounds: Parties.** Anyone deprived of the possession of land, or a building, by force, intimidation, fraud, strategy, or stealth, and any landlord, vendor, vendee, or other person, against whom the possession of land or a building is unlawfully withheld, by his tenant, vendee, vendor, or other person, after the expiration of his right by contract, express or implied, to hold possession, and the legal representatives or assigns of him who is so deprived of possession, or from whom possession is so withheld, as against him who so obtains possession or withholds possession after the expiration of his rights, and all persons claiming to hold under him,[3] shall, at any time within one year[4] after such deprivation or unlawful withholding of possession be entitled to restitution of possession, and to damages[5], in a court of justice of the peace, in the manner hereinafter prescribed. The owner of land, or of a building, occupied by a tenant, may likewise obtain restitution or possession of the premises, and recover rents due and damages, in the manner next hereinafter provided, when the tenant for thirty days[6] after due demand for payment of rent due for the occupancy of the premises shall have refused or neglected to make payment of the same. (Act 190, sec. 80.).

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1 All the proceedings treated of in this title are within the jurisdicion of a justice of the peace, tho in all but the first the court of first instance also has jurisdiction.

2 This corresponds, in a general way, to the Spanish remedies of *desahucio* and *interdicto de recobra*. (Spanish Code C. P. sec. 1633.) The proceeding of *interdicto de retener* has not been retained. See. Op. Atty. Gen. 4 Off. Gaz. 771.

3 Id. *Semble*, That the occupants of distinct parcels cannot be joined as defendants. Santos v. Limuco, 5 Phil. 15; 4 Off. Gaz. 217.

4 After a year the court of first instance alone has jurisdiction of an action for possession. Alonso v. Placer, 5 Phil. 71; 4 Off. Gaz 223.

5 Measure of damages is fair rental value. Sparrevohn v. Fisher, 2 Phil. 676. They do not include waste. Veloso v. Ang Seng Teng, id. 622

6 Action brought before this period is premature. Co-Tiong-Co v. Co-Quing-Co, 6 Phil. 46; 4 Off. Gaz. 363. Cf. Enriquez v. A. S. Watson & Co. 6 Phil. 114; 4 Off. Gaz. 446.

SEC. 74. **Complaint.** The party turned out of possession, or held out of possession, shall institute an action before any justice of the peace of the municipality in which the land or building, or some

part thereof, is situated, to recover possession thereof and damages. The complaint shall be substantially in the following form:

"The plaintiff (naming him) complains that the defendant (naming him) has unlawfully turned him out of possession (or unlawfully withholds from him the possession, as the case may be) of certain lands and building (here describe the premises) lying and being within said municipality whereof he prays the possession, and he also prays for just damages and costs.

"----------"

The Plaintiff (naming him)

The complaint shall be verified by the oath of the plaintiff, or his agent or attorney, and certified by the justice of the peace before whom the action is instituted. Process shall issue to and be served upon the defendant as in other actions before a justice of the peace. (Id. sec. 81).

SEC. 75. **Trial.** The action shall be tried in the same manner[1] as other actions before a justice of the peace. (Act 190, sec. 82).

1 No question of title can be raised or decided. Pascual v. Angeles, 4 Phil. 604; 4 Off. Gaz. 321. But a purely specious claim of title will not oust the justice of jurisdiction (Clark v. Tukey Land Co., (Neb.) 106 N. W. 328), nor will a mere averment that title is involved. Green v. Morse, 57 Neb. 391; 77 N. W. 925.

Formerly no evidence of title could be received. Evangelista v. Tabayuong, 7 Phil. 607; 5 Off. Gaz. 280. But under Act 1627 (*ante* sec. 25) such evidence is admissible to determine "the character and extent of possession," etc. This is an accordance with the rule prevailing in many American states. 13 Am. & Eng. Encyc. of Law, (2d ed.) pp. 754-6.

SEC. 76. **No Continuance** shall be granted for a longer period than one week, unless the defendant applying therefor shall give an obligation to the adverse party, with good and sufficient sureties to be approved by the justice, conditioned for the payment of rent and damages that may accrue, if judgment be rendered against the defendant. (Id, sec. 83).

SEC. 77. **Judgment.** If, upon trial, the court shall find that the complaint is not true, it shall enter judgment[1] against the

1. *Effect.* A judgment rendered in a suit of unlawful entry and detainer, either for the plaintiff or defendant, shall not bar an action in the court of first instance between the same paries respecting title * to the land or building; nor shall any judgment given therein be held conclusive of the facts found in another action between the same parties. (Id. sec. 87.)

* Bago v. Garcia, 5 Phil. 924; 4 Off. Gaz. 145.

plaintiff for costs. If it finds the complaint to be true, it shall render judgment against the defendant in favor of the plaintiff for restitution of the premises, and costs of suit, and for all arrears of rent, or a reasonable compensation for the use and occupation of the premises[1]. (Id. sec. 84).

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1 See sec. 73 note 5.

SEC. 78. **Writ: Form.** When a judgment of restitution shall be entered by the justice, he shall, at the request of the plaintiff, his agent or attorney, issue a writ of execution thereon, which shall be in the following form, at near as practicable:

"The Philippine Islands"
"Province of ....
"Municipality of . . ..
"To any officer authorized to serve process in the municipality of ....

"Whereas, in a certain action for the forcible entry and detention (or forcible detention, as the case may be) of the following described permises, to wit, (here describe them) lately tried before me, wherein ... . was plaintiff and .... was defendant, judgment was rendered on the ... . day of ... ... , A. D. .... , that the plaintiff have restitution of the premises, and also that he recover damages to the amount of ... ... dollars; also that he recover costs in the sum of ... . dollars. You are therefore hereby commanded to cause the defendant to forthwith remove from said premises, and that the said plaintiff have restitution of the same; also that you levy upon the goods and chattels of the said defendant and collect from him the rent, damages and costs aforesaid, and costs of this execution and service thereof, in due form of law.

Witness my hand this .... day of ... . A. D ....

"----------
Justice of the peace".

But such execution shall not issue within five days from the date of the judgment, nor if an appeal to the court of first instance has been perfected, together with the due execution and delivery of the obligation referred to in section eighty eight. [*80 infra*] (Id. sec. 85).

SEC. 79. **Same: Service.** The officer shall, upon receiving the execution, execute the same by restoring to the plaintiff the possession of the premises, and shall levy and collect the rent, damages, and costs awarded, and make return, as upon other executions. (Id. sec. 86).

SEC. 80. **Appeal.** Either party may appeal from the judgment of the justice to the court of first instance and the suit shall therein be conducted as appeals from justices in other civil actions[1]; if the plaintiff recovers possession of the premises in the court of first instance, he shall have judgment for the amount of the rents or damages then due. If the defendant appeals from the judgment of the justice, he shall give security by an obligation, with sufficient sureties, to be approved by the justice, to the plaintiff to enter the action in the court of first instance, and to pay rent then due, and intervening rent, damages and costs, and the defendant and the sureties shall be liable upon their obligation for such rent, intervening rent, damages and costs, down to the time of the final judgment in the action. The appeal shall not be allowed until such obligation has been filed with the justice, and the obligation shall be transmitted by the justice with the other papers to the clerk of the court of first instance to which the action is appealed. (Id. sec. 88).

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1 See note to sec. 43 *supra* as to the necessity of preserving the same issues on appeal.

2. Replevin[1] (Manual Delivery of Personal Property.)

SEC. 81. **Lies When.** Whenever the complaint in an action shall pray for the recovery of the possession of personal property, the plaintiff may, at the time of instituting the action, or at any time before answer, file a notice claiming the delivery of such property to him, in the manner hereinafter provided. (Act 190, sec. 262.)

1 The justice of the peace has jurisdiction in this action. See *ante* sec. 25.

SEC. 82. **Affidavit: Bond.** Where a delivery is claimed, an affidavit must be made by the plaintiff, or by some one in his behalf, showing:

1. That the plaintiff is the owner of the property claimed (particularly describing it) or is entitled to the possession thereof;
2. That the property is wrongfully detained by the defendant;
3. The alleged cause of detention thereof according to his best knowledge, information, and belief;
4. That it has not been taken for a tax assessment or fine pursuant to a statute, or seized under an execution, or an attachment against the property of the plaintiff, or, if so seized, that it is by statute exempt from such seizure;
5. The actual value of the property.

The plaintiff shall also at the same time file with the clerk[1] a written obligation of the plaintiff, executed by two or more sureties[2] approved by the court, to the effect that they are bound to the defendant in double the value of the property, as stated in the affidavit for the prosecution of the action, for the return of the property to the defendant, if the return thereof be adjudged, and for the payment to him of such sum as may, in the cause, be recovered against the plaintiff. The affidavit and obligation shall be filed with the clerk of the court in which the action is pending. (Id. Sec. 263.)

1 In the justice's court this means the justice himself.

2 *Objection to Sureties.* The defendant may, within two days after the service of a copy of the affidavit and undertaking and warrant, give notice to the clerk that he excepts to the sufficiency of the obligation or of the sureties. If he fails to do so, he is deemed to have waived all objections to them. When the defendant excepts, the clerk, on notice to both parties, and on hearing, shall investigate the sufficiency of the sureties as to their financial responsibility. If the clerk finds the obligation to be insufficient in amount, he shall require a new obligation with sufficient sureties to be executed in double the value of the property as he shall ascertain it to be. If he shall find that the sureties are insufficient, he shall require new and sufficient sureties forthwith. In either case, if the plaintiff does not forthwith furnish a sufficient obligation with sufficient sureties, the clerk shall make an order for the return of the property to the defendant, and it shall be returned. If the defendant except to the obligation or to the sureties, he cannot reclaim the property as provided in section [86 *infra*.] (Id. sec. 266).

Sec. 83. **Warrant.** Upon the filing of such affidavit and obligation it shall be the duty of the clerk[1], at the request of the plaintiff or his attorney, to issue, under the seal of the court, a warrant requiring the officer of the court forthwith to take into his custody the personal property alleged to be wrongfully detained. (Id. Sec. 264).

1 Justice.

Sec. 84. **Same: Service.** Upon receiving the warrant named in the last section the officer must forthwith take the property described in the warrant, if it be in the possession of the defendant or his agent, and retain it in his custody. If the property, or any part thereof, be concealed in a building or enclosure, the officer must publicly demand its delivery; if it be not delivered he must cause the building or enclosure to be broken open and take the property into his possession. When the officer has taken property as herein provided, he must keep it in a secure place

and ultimately deliver it to the party entitled thereto, upon receiving his fees for taking, and his necessary expenses for keeping the same. He must, without delay, serve on the defendant a copy of the notice, undertaking, and warrant, in the manner provided by law for service of process. (Act 190, Sec. 265.)

SEC. 85. **Same: Return.** The officer must file the warrant with his proceedings indorsed thereon, with the clerk of the court within twenty days after taking the property mentioned therein. (Id sec. 271).

SEC. 86. **Redelivery.** At any time before the delivery of the property to the plaintiff, as in this section provided, the defendant may, if he do not except to the obligation or sureties of the plaintiff, require the return thereof, upon delivering to the clerk[1] a written obligation to the plaintiff, executed by him, with two or more sufficient sureties, to the effect that they are bound in double the value of the property as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment of such sum to him as may be recovered against the defendant. If a return of the property be not so required within five days after the taking and service of the notice to the defendant, it must be delivered to the plaintiff, except as provided in section two hundred and seventy.[2] (Id. Sec. 267.)

1 Justice.
2 Sec. 89 *infra*.

SEC. 87. **Same: Bond.** The defendant's sureties, upon notice to the plaintiff, not less than two nor more than five days, must justify before the clerk[1], as provided in section two hundred and sixty-six[2], and upon such justification the officer must deliver the property to the defendant. If the defendant's sureties, or others in their place, fail to justify at the time and place appointed, the officer must deliver the property to the plaintiff. (Id. Sec. 268.)

1 Justice.
2 Sec. 82, note 2.

SEC. 88. **Officer's Liability.** The officer will be responsible for the property until the same is delivered to the plaintiff or defendant, as herein provided. The clerk will be responsible for the sufficiency of the sureties at the time he shall approve them, but not for their sufficiency at a subsequent date should their financial standing be thereafter changed. (Id Sec. 269).

SEC. 89. **Third Party Claimant.** If the property taken be claimed by any other person than the defendant or his agent, and such person make an affidavit of his title thereto or right to the possession thereof, stating the grounds of such right or title, and serve the same upon the officer while he has possession of the property, the officer is not bound to keep the property, or deliver it to the plaintiff, unless the plaintiff on demand of him or his agent, indemnify the officer against such claim by an obligation with two sufficient sureties; and no claim to such property or damage for its seizure, by any other person than the defendant or his agent, shall be valid against the officer unless so made. But nothing herein contained shall prevent such third person from vindicating his claim to the property by any proper action. (Id Sec. 270).

SEC. 90. **Judgment.** After a trial of the issues the court shall find in whom is the right of possession and the value of the property and shall render judgment in the alternative for the delivery thereof to the party entitled to the same or for the value in case delivery cannot be made, and also for such damages as either party may prove, and for costs. (Act 190, Sec. 272 as amended by Act 1627, Sec. 17).

3. Attachment.

SEC. 91. **When Granted: Grounds.** A plaintiff may, at the commencement of his action, or at any time afterwards, have the property of the defendant attached as security for the satisfaction of any judgment that may be recovered, unless the defendant give security to pay such judgment in the manner hereinafter provided, in the following cases:

1. In an action for the recovery of money or damages on a cause of action arising upon contract, express or implied, when the defendant is about to depart from the Philippine Islands, with intent to defraud his creditors;

2. In an action for money or property embezzled or fraudulently misapplied or converted to his own use by a public officer, or an officer of a corporation, or an attorney, factor, broker, agent or clerk, in the course of his employment as such, or by any other person in a fiduciary capacity, or for a wilful violation of duty;

3. In an action to recover the possession of personal porperty unjustly detained, when the property, or any part thereof, has been concealed, removed or disposed of, to prevent its being found or taken by the officer,

4. When the defendant has been guilty of a fraud in contracting the debt or incurring the obligation upon which the action is brought; or in concealing or disposing of the property, for the taking, detention or conversion of which the action is brought;

5. When the defendant has removed or disposed of his property or is about to do so with intent to defraud his creditors;

6. In an action against a defendant not residing in the Philippine Islands. (Act. 190, secs. 442 424)

Regardless of the question (see Tan Cong v. Stewart. per Johnson J., June 18, 1907), whether Chapter XVII of Act 190, providing for arrest in civil cases conflicts with the guaranty in sec. 5 of the Philippine Bill "that no person shall be imprisoned for debt," the grounds of arrest remain those of attachment.

SEC. 92. **By Whom.** An order[1] for attachment may be granted by a judge of the supreme court or by a judge of the court of first instance for the province in which the action is pending, or by a justice of the peace in an action properly brought before his court. (Act 190, Sec. 425).

1 *Form.* UNITED STATES OF AMERICA. Philippine Islands, Province of ....., Municipality of ....
To any officer authorized to serve process:
GREETING;

Whereas .... of .... (or .... as agent or attorney, of .... for the plaintiff) has complained on oath to me .... that ..... is justly indebted to the said .... (plaintiff), in the amount of $ ..... and that said .... (defendant) is a nonresident (or is about to abscond from the Islands, etc. reciting the affidavit), and whereas security has been given by the plaintiff according to law; we, therefore, command you, that you attach the estate, real and personal, of the said ....defendant in your province (or municipality) to the value of the said demands and costs of suit, and that you safely keep the same according to law, unless the defendant gives security to pay such judgment as may be recovered in the said action, in the manner provided by law, and that you summon the said .... defendant, if to be found in your province (or municipality) to appear before me on the ... . day of .... to answer the above complaint a copy of which is hereto annexed, and do you have there in said court then this writ with your proceedings endorsed thereon.

Witness my hand, this ....day of .... 190 ...

Justice of the Peace

(Act 190 sec. 784, Form 42, adapted to justice's court)

2 Under the former Code of Civil Procedure (Art. 1370) the justice could order an *embargo preventivo*, if asked when the complaint was filed, where the debt did not exceed 500 pesetas. But one seeking the rescission of the contract out of which the alleged debt arose was not entitled to an attachment. Piñeyro v Utor, 1 Phil. 79.

The justice's jurisdiction is now determined, as in other cases, by the value of the property. See Springer v Odlin, 3 Phil. 348.

SEC. 93. **Affidavit.** A judge or justice of the peace shall grant an order of attachment when it is made to appear to the judge or justice of the peace by the affidavit of the plaintiff, or of some other person who knows the facts, that a sufficient cause of action exists, and that the case is one of those mentioned in section [*91 supra*] and that there is no other sufficient security for the claim sought to be enforced by the action, and that the amount due to the plaintiff above all legal set-offs or counterclaims is as much as the sum for which the order is granted. (Id. Sec. 426.)

SEC. 94. **Obligation.** Before the order is made, the party applying for it, or some person on his behalf, must execute to the defendant an obligation in an amount to be fixed by the judge, or justice of the peace, and with sufficient surety to be approved by him, which obligation shall be for a sum not less than two hundred dollars, and not exceeding the amount claimed by the plaintiff, that the plaintiff will pay all the costs which may be adjudged to the defendant, and all damages which he may sustain by reason of the attachment, if the same shall finally be adjudged to have been wrongful or without sufficient cause. (Id. Sec. 427).

SEC. 95. **Levy: personalty.** The order of attachment shall be served by the officer of the court by attaching and safely keeping all the movable property[1] of the defendant in the Philippine Islands, or so much thereof as may be sufficient to satisfy the plaintiff's demands, unless the defendant gives security by obligation to the plaintiff, with sufficient surety, to be approved by the judge who granted the order of attachment, in an amount sufficient to satisfy such demands besides costs, or in an amount equal to the value of the property which has been or is about to be attached. The property so attached shall be held to await final judgment in execution, unless released as provided in this section or in section [*104 infra*]. (Id., sec. 428).

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1 Money in clerk of court's possession *ex officio* is not attachable. Springer v Odlin, 3 Phil. 344.

Corporate Stock. Stocks or shares, or an interest in stocks or shares, of any corporation or company shall be attached by leaving with the president, or other head of the same, or the secretary, cashier or other managing agent thereof, a copy of the order of attachment and a notice stating that the stock or interest of the defendant is attached, in pursuance of such order. (Act 190 sec. 430.)

Sale of Perishable Property. Whenever it shall be made to appear to the judge or the court in which the action is pending, by hearing.

after notice to both parties if practicable, that the property attached is perishable, or that the interests of all the parties to the action will be subserved by the sale thereof, the judge may, on motion, order such property to be sold at public auction in such manner as he may direct, and the proceeds to be deposited in court to abide the judgment in the action. (Id sec. 435).

If the property taken be claimed by any other person than the defendant or his agent and such person make an affidavit of his title thereto or right to the possession thereof, stating the grounds of such right or title and serve the same upon the officer while he has possession of the property, the officer shall not be bound to keep the property under the attachment, unless the plaintiff, on demand of him, or his agent, indemnify the officer against such claim by an obligation with two sufficient sureties; and no claim to such property or damage for its seizure by any other person than the defendant or his agent shall be valid against the officer unless so made; but nothing herein contained shall prevent such third person from vindicating his claim to the property by any proper action. (Id. sec. 442).

One whose property has been attached in an action to which he is not a party my proceed to claim it under section 451 of Act 190 but is not entitled to a writ of prohibition against the justice granting the order. Felizardo v. Justice of the Peace, 3 Phil., 635.

SEC. 96. **Same: Real property,** standing upon the records in the name of the defendant or not appearing at all upon the record, shall be attached[1] by filing with the registrar of titles of land, for the province in which the land is situated, a copy of the order of attachment, together with a description of the property attached, and a notice that it is attached, and by leaving a similiar copy of the order, description; and notice with an occupant of the property, if there is one.

Real property or an interest therein, belonging to the defendant and held by any other person, or standing on the records in the name of any other person, shall be attached by filing with the registrar of land titles in the province in which the land is situated, a copy of the order of attachment. together with a description of the property, and a notice that such real property and any interest of the defendant therein, held by, or standing in the name of, such other person (naming him) are attached, and by leaving with the occupant, if any, and with such other person, or his agent, if known and within the province, a copy of the order, description, and notice. The registrar must index attachments filed under the first paragraph of this section, in the names both of the plaintiff and of the defend-

1 As to the lien of the attachment see Liong-Wong-Ship v. Sunico, 5 Off. Gaz. 282.

ant, and must index attachments filled under the second paragraph of this section, in the names of the plaintiff and of the defendant and of the person by whom the property is held or in whose name it stands on the records. (Id. sec. 429.)

SEC. 97. **Garnishment:** *Debts and Credits*, and other personal property not capable of manual delivery, shall be attached by leaving with the person owing such debts or having in his possession or under his control, such credits and other personal property, a copy of the order of attachment, and a notice that the debts owing by him to the defendant, or the credits and other personal property in his possession or under his control, belonging to the defendant, are attached in pursuance of such order. (Id. sec. 431).

SEC. 98. **Same: Effect.**[1] All persons having in their possession or under their control any credits or other personal property belonging to the defendant, or owing any debts to the defendant at the time of service upon them of a copy of the order of attachment and notice as provided in the last section, shall be, unless such property be delivered up or transferred, or such debts be paid to the clerk of the court in which the action is pending, liable to the plaintiff for the amount of such credits, property, or debts, until the attachment be discharged, or any judgment recovered by him be satisfied. (Id. sec. 432.)

1 A purchaser of the attached property takes subject to the attachment. Joaquin v. Avellano, 6 Phil. 551; 4 Off. Gaz. 698.

See Liong-Wong-Ship v. Sunico, 5 Off. Gaz. 283.

SEC. 99. **Examination of Debtor.** Any person owing debts to the defendant, or having in his possession or under his control any credits or other personal property belonging to the defendant may be required to attend before the court in which the action is pending or before a referee apointed by the court, and be examined on oath respecting the same. The defendant may also be required to attend, for the purpose of giving information respecting his property, and may be examined on oath. The court may, after such examination, order personal property capable of manual delivery, belonging to the defendant, in the possession of the person so required to attend before the court, to be delivered to the clerk of the court on such terms as may be just, having reference to any liens thereon or claims against the same, to await the final result of the action. (Id. sec. 433).

SEC. 100. **Satisfaction of Claim.** If judgment be recovered by the plaintiff, the officer of the court must cause the same to

be satisfied, out of the property attached, if it be sufficient for that purpose, in the following manner:

1. By paying to the plaintiff the proceeds of all sales of perishable or other property sold by him in pursuance of the order of the judge, or so much as shall be necessary to satisfy the judgment.

2. If any balance remain due, and execution shall have been issued on the judgment, he shall sell under the execution so much of the property, real or personal, as may be necessary to satisfy the balance, if enough for that purpose remain in his hands, or in those of the clerk of the court.

3. By collecting from all persons having in their possession credits belonging to the defendant, or owing debts to the defendant at the time of the service upon them of the order of attachment of such credits or debts, the amount of such credits and debts as determined by the court in the action and stated in the final judgment, and paying the proceeds of such collection over to the plaintiff.

The officer shall make return in writing to the court of his proceedings under the section. (Id. Sec. 436).

Collecting Deficiency. If, after realizing upon all the property attached, including the proceeds of any debts or credits collected, and applying the proceeds in extinguishment of the judgment, less the expenses of proceedings upon the judgment, any balance shall remain due, the officer of the court must proceed to collect such balance as upon an execution in other cases. Whenever the judgment shall have been paid, the officer, upon reasonable demand, must deliver over to the defendant the attached property remaining in his hands, and any proceeds of the property attached unapplied on the judgment. (Id. sec. 437).

Action on Bond. If the execution be returned unsatisfied, in whole or in part, the plaintiff may maintain an action upon the obligations if any, given pursuant to sec. [95 *supra*] (Id. sec. 438.)

Sec. 101. **Return of order.** The officer of the court making the attachment shall indorse upon its back a full statement of all his proceedings under the order, including a complete inventory of the property attached, and sign the same, and shall return the order of attachment to the clerk of the court in which the action is pending to be filed with the other papers in the action. (Id. sec. 434).

Sec. 102. **Restoration:** *If the Defendant Recovers Judgment* against the plaintiff, all the proceeds of sales and money collected by the officer of the court, under the order of attachment, and all the property attached remaining in said officer's hands shall be delivered to the defendant, and the order of attachment discharged, and the defendant may have judgment against the plaintiff upon the obligation provided in sec. [94 *supra*] for any dam-

ages he may have sustained by reason of the attachment, after summary hearing in the same action on due notice. (Id., sec. 439).

SEC. 103. **Dissolution: On Bond.** At any time, after the commencement of an action upon which an order of attachment has been made, the defendant may, upon reasonable notice to the plaintiff, apply to the judge or justice of the peace who granted the order of attachment, or to the judge of the court in which the action is pending, for an order to discharge the attachment, wholly or in part; and the judge or justice of the peace shall,after hearing, on due notice to both parties, discharge the order of attachment provided the defendant shall execute an obligation to the plaintiff with surety to be approved by the judge, or justice of the peace, to the effect that in case the plaintiff recover judgment in the action, the defendant will, on demand, redeliver the attached property so released to the officer of the court, to be applied to the payment of the judgment, or, in default thereof, that the defendant and surety, will, on demand, pay to the plaintiff the full value of the property released. The judge or justice of the peace making such order may fix the sum for which the undertaking must be executed, and for that purpose may take such steps as he finds necessary to determine the value of the property attached, which obligation shall be filed with the other papers in the cause, and upon its approval by the judge or justice of the peace and the making of the order by him for the discharge of the attachment, all of the property so released, and all of the proceeds of the sales thereof, shall be delivered to the defendant, the obligation aforesaid standing in place of the property so released. (Sec. 440).

SEC. 104. **Same: on Motion.** The defendant, may also at any time either before or after the release of the attached property, or before any attachment shall have been actually levied, upon reasonable notice to the plaintiff, apply to the judge or justice of the peace who granted the order of attachment or to the judge of the court in which the action is pending, for an order to discharge the attachment on the ground that the same was improperly or irregularly issued. If the motion be made on affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other evidence in addition to those on which the attachment was made. If upon such application it satisfactorily appears that the writ of attachment was improperly or irregularly issued, it must be discharged. (Id. Sec. 441).

4. Proceedings In Aid of Execution.

SEC. 105. **Examination of Judgment Debtor: When and by Whom Ordered.** When an execution against property of a judgment debtor or any one of several debtors in the same judgment, issued to the the sheriff or his deputy for the province where the defendant resides, or, if he does not reside in the Philippine Islands, to the sheriff or his deputy for the province where the judgment was rendered, is returned unsatisfied, in whole or in part, the judgment creditor, at any time after such return is made, shall be entitled to an order from a judge of the court of first instance which rendered the judgment, or, if no appeal was taken from the justice's judgment, then from the justice of the peace in whose court the judgment was rendered, requiring such judgment debtor to appear and answer concerning his property before such judge, or before a referee appointed by him, or before such justice, as the case may be, at the time and place specified in the order; but no judgment debtor shall be required to attend before a judge or referee out of the province in which such debtor resides or is found, or before a justice out of the municipality in which such debtor resides or is found. (Act 1627 Sec. 19).

SEC. 106. **Preliminary Steps.** After the issuance of execution against property and upon proof, by affidavit of a party or otherwise, to the satisfaction of the judge or the justice of the peace, that said execution remains unsatisfied and that any judgment debtor has property subject to said execution which should be applied toward the satisfaction of the judgment, such judge or justice may, by an order, require the judgment debtor to appear at a specified time and place within the territorial limits fixed in the preceding section, to answer concerning the same; and such proceedings may thereupon be had for application of the property of the judgment debtor towards the satisfaction of the judgment as are hereinafter prescribed. The judge may require the appearance to be made before a referee appointed by him. (Id. Sec. 20).

SEC. 107. **Examination of Debtor of Judgment Debtor.** After the return of an execution against the property of a judgment debtor, or of one of several debtors in the same judgment, unsatisfied in whole or in part, and upon proof by affidavit or sworn petition to the satisfaction of the judge or justice of the peace, as the case may be, that a person, corporation or other

legal entity has property of such judgment debtor, or is indebted to him, the judge or justice of the peace may, by an order, require such person, corporation or other legal entity or any officer or member thereof, to appear and answer concerning the same at a specified time and place, within the province, and within the municipality in which such person, corporation or other legal entity is served with the order, if such order is made by a justice of the peace. The service of the order shall bind all credits due the judgment debtor and the money and property in the possession or in the control of such person, corporation, or legal entity from the time of service; and the judge or justice of the peace may also require notice of such proceedings to be given to any party to the action, in such manner as may seem to him proper. (Id. Sec. 21).

Sec. 108. **Enforcement of Attendance.** A party or witness may be compelled, by an order, or subpoena as in other cases, to attend before a judge, justice of the peace, or referee, to testify in such proceedings. Failure to obey such order or subpoena, duly served, shall constitute contempt. In case of such contempt the referee or justice of the peace may report the matter to the court of first instance of the province and such court may punish the contemnor accordingly. (Id. Sec. 22).

Sec. 109. **Continuance.** The judge, justice of the peace or or referee acting under this provisions of this [subdivision] may continue the proceedings from time to time until they are completed: *Provided*, That such continuance, if granted by a justice of the peace, shall not exceed ten days. (Id. sec. 23).

Sec. 110. **Oath and Record.** If the examination is before a referee, it must be taken by the referee in writing and certified by him to the judge. All examinations and answers before a judge, justice of the peace, or referee must be under oath, and in case of a corporation, or other legal entity, the oath must be made by the legal representative thereof upon whom process may be served. (Id. sec. 24)

Sec. 111. **Disposition of Property: Appeal.** The judge or justice of the peace may order any property of the judgment debtor, or money due him, not exempt by law, in the hands of either, himself or other person, or of a corporation or other legal entity, to be applied towards the satisfaction of the judgment, subject to any prior rights of the holders of such property; but the earnings of the debtor for his personal services at any

time within one month preceding the order cannot be applied when it is made to appear by the affidavit of the debtor, or otherwise, that such earnings are necessary for the support of his family. When the order is made by a justice of the peace an appeal may be taken as in other cases. (Id. sec. 25)

5. SEARCH WARRANTS.

a. Preliminary.

SEC. 112. **Nature.** A search warrant is an order in writing, issued in the name of the United States, signed by a judge or justice of the peace, and directed to a peace officer, commanding him to search for personal property and bring it before the court. (G. O. 58, sec. 95).

SEC. 113. **Search of Person.** A person charged with a crime may be searched for dangerous weapons or anything which may be used as proof of the commission of the crime. (Id. sec. 105).

SEC. 114. **Limitations.** The right to be secure against unreasonable searches and seizures shall not be violated. * * No warrant shall issue but upon probable cause[1], supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized. (Phil. Bill July 1, 1902, sec. 5)[2].

1 *Abuse.* Any person who shall procure a search warrant maliciously and without probable cause, and any officer who shall unlawfully exceed his authority or use unnecessary severity in executing the same, shall be punished by imprisonment for not more than one year or by a a fine of not exceeding one thousand pesos, or by both such fine and imprisonment. (G. O. 58, sec. 106.)

2 This is a substantial reenactment of Amendment IV to the Federal Constitution.

b. Issue

SEC. 115. **Grounds.** It may be issued upon the following grounds: (1) When the property was stolen or embezzled: (2) When it was used, or when the intent exists to use it, as the means of committing a felony. (G. O. 58, sec. 96).

SEC. 116. **Examination.** The judge or justice must, before issuing the warrant, examine on oath the complainant and any witnesses he may produce and take their depositions in writing. (Id. 98).

SEC. 117. **Form.** If the judge or justice is thereupon satisfied of the existence of facts upon which the application is based,

or that there is probable cause to believe that they exist, he must issue the warrant, which must be substantially in the following form:

... .

Province of ....

The United States to any .... , or policeman in the province of..... ....

. Proof by affidavit having this day been made before me by (naming the persons whose affidavits have been taken), that (stating the grounds of the application or, if the affidavit is not positive, that there is probable cause for believing) that (stating the ground of the application in the same manner,) you are, therefore, commanded in the daytime (or at any time in the day or night as the case may be) to make immediate search on the person of .... or in the house situated .... (describing it or any other place to be searched with reasonable particularity, as the case may be) for the following property: (describe it with reasonable certainty) and if you find the same or any part thereof, to bring it forthwith before me at ....

Witness my hand this .... day of. .. .. 190....

[Signed] ... .

(Id. sec. 99.)

c. Execution.

Sec. 118. **Limit.** A search warrant shall be valid for ten days from its date. Thereafter it shall be void. (Id. sec. 102).

Sec. 119. **Time of Service.** The warrant must direct that it be served in the daytime, unless the affidavit positively asserts that the property is on the person or in the place ordered to be searched, in which case a direction may be inserted that it be served at any time of the day or night. (Id. sec. 101).

Sec. 120. **Manner.** The officer, if refused admittance to the place of directed search after giving notice of his purpose and authority, may break open[1] any outer or inner door or window of a house, or any part of a house or anything therein to execute the warrant or to liberate himself or any person lawfully aiding him when unlawfully detained therein. No search of a vacant house shall be made except in the presence of at least two competent witnesses, residents of the neighborhood. (Id. sec. 100).

1 Officer lawfully serving writ cannot be held for *robo*. U. S. v. Cuison 4 Phil. 194; 3 Off. Gaz. 135.

Sec. 121. **Receipt.** The officer seizing property under the warrant must give a detailed receipt for the same to the person on whom or in whose possession it was found, or, in the absence of

any person, must, in the presence of at least two witnesses, leave a receipt in the place in which he found the seized property. (Id. sec. 103).

SEC. 122. **Disposal of Property.** The officer must forthwith deliver the property to the court, together with a true inventory thereof duly verified by oath. (Id., Sec. 104).

6. Inquests Upon Corpses.

SEC. 123. **Procedure**—Whenever a justice of the peace outside the city of Manila[1] has information that any person has died in his municipality under circumstances affording a reasonable ground to suspect that such death was the result of a criminal act or omission, or was the result of other than natural causes, it shall be the duty of such justice forthwith to go to the place where the corpse is, cause it to be exhumed if necesary, and hold an inquest, as to the cause of such death, calling and examining such witnesses and making such investigations at the scene of death as may be required. If, as a result of such inquest, the justice shall find that the deceased died from the criminal act or omission of another who is not in custody, the justice shall forthwith issue a warrant for the arrest of such person, or, if necessary, may give oral direction for such arrest to any officer authorized to serve such process, and shall at once forward to the provincial fiscal a report of such inquest and receive the same fee as in preliminary investigations. The fiscal shall make such additional investigation as may be necessary. In the absence or disability of both the justice of the peace and the auxiliary justice of the peace of any municipality, the duties enjoined by this section upon them shall be performed by the municipal president. The provisions[2] of subdivision (*j*) of section eighteen of Act 1397 shall not be aplicable if there be a justice of the peace in the township. (Act 1627, Sec. 41).

1 In Manila the inquest is conducted by the prosecuting attorney. Act 267, sec. 9.

2 These require the president of a municipality organized under that Act to investigate crimes.

PART TWO

MANILA MUNICIPAL COURT.

1. Organization.

SEC. 124. **Locus.** There shall be one municipal court[1] with territorial jurisdiction embracing the entire police jurisdiction[2] of the city. (Act 183 sec. 40 as amended by Act 612 sec 2).

1 *Session.* There shall be a daily session of court, Sundays and legal holidays alone excepted. (Id. sec. 40).

2 *The juridiction of the city of Manila for police purposes* only shall extend to three miles from the shore into Manila Bay and over a zone surrounding the city on land of two and one-half miles in width. Within the two and one-half mile zone beyond the limits of the city the court of first instance and the municipal court of the city of Manila shall have concurrent jurisdiction with the courts of first instance and the courts of justices of the peace of the provinces and municipalities, respectively, to try crimes and misdemeanors committed therein. The court first taking jurisdiction of such an offense shall thereafter retain exclusive jurisdiction thereof. The police of the several municipalities concerned shall have concurrent jurisdiction with the police of the city of Manila for the maintenance of good order and the enforcement of lawful ordinances thruout the two and one-half mile zone: *provided, however,* that any license that may lawfully be granted within the two and one-half mile zone shall be granted by the proper authorities of the municipality concerned, and the fees arising therefrom shall appertain to the treasury of the municipality concerned and not to that of the city of Manila: *provided further,* that all fines, forfeitures, fees, and costs imposed by reason of offenses committed within the two and one-half mile zone shall accrue, not to the treasury of the city of Manila, but to the treasury to which they would otherwise accrue, had not this section been enacted. (Act 1457, sec. 1).

SEC. 125. **Officers.** The Governor General, by and with the consent of the Commission, shall appoint a judge[1] and

1 *Compensation.* The judge of the municipal court of Manila shall receive an annual compensation of three thousand five hundred dollars, and the clerk of the court shall receive an annual compensation of one thousand six hundred dollars. There may be employed in the office of the clerk of the court: One deputy clerk at a compensation of one thousand dollars per annum; one deputy at an annual compensation of six hundred dollars; one interpreter at a compensation of one thousand six hundred dollars per annum. (Act 612, sec. 6).

clerk[1] for such municipal court, and a vacancy occurring in the clerkship, after the first appointment, shall be filled under the provisions and restrictions of the Civil Service Act. A temporary vacancy in the office of the judge, occasioned by sickness or absence, shall be filled by appointment by the Governor General. (Act 612 sec. 2.)

1 *Powers and duties of clerk.* The clerk of said court shall have power to administer oaths. [He] shall keep its seal and affix it to all orders, judgments, certificates, records, and other documents issued by the court. He shall keep a docket of the trials in the court, in which he shall record in a summary manner the name of the defendant, the charge against him, the name of the prosecuting witness, the date of the arrest, the appearance of the defendant, the date of the trial, and the nature of the judgment, together with the fines and costs adjudged or collected in accordance with the judgment (Act 183 sec. 40).

SEC. 126 **Same: Executive.** The chief of police shall be the executive officer of the court and shall, either in person or by deputy, attend all sessions, serve all process and execute all orders and judgments of the same. (Act 183, sec. 40).

2. Jurisdiction,

SEC. 127. **In General.** Said court shall respectively have exclusive jurisdiction over all criminal cases arising under the ordinances of the city, and over all criminal cases arising under the penal laws of the Philippine Islands, where the offense is committed within the police jurisdiction of the city and their respective districts and the maximum punishment is by imprisonment for not more than six months, or a fine of not more than one hundred dollars, or both. Such courts may also conduct preliminary examinations[1] for any offense, without regard to the limit of punishment, and may release, or commit and bind over any person charged with such offense to secure his appearance before the proper court. Said court shall have no civil jurisdiction except for the forfeiture and collection of bonds given in cases or proceedings pending therein. (Id).

1 *The prosecuting attorney* or any of his assistants may, if he deems it wise, conduct investigations in respect to crimes, misdemeanors and violations of ordinances by taking oral evidence of reputed witnesses, and for this purpose may, by subpoena, summon witnesses to appear and testify under oath before him, and the attendance or evidence of an absent or recalcitrant witness may be enforced by application to the municipal court or the court of first instance. (Id).

SEC. 128. **Enforcement of Process: Bonds.** The judge shall have power to enforce all process of the court, compel the

attendance of witnesses and punish all contempts of court by fine or imprisonment, or both, under the limitations imposed by the Code of Civil Procedure. He may require of any person arrested a bond for good behavior or to keep the peace, or for the further appearance of such person before a court of competent jurisdiction, and no such bond shall be accepted unless it be executed by the person in whose behalf it is made, with sufficient surety or sureties, to be approved by said court. (Id).

SEC. 129. **Other Powers.** The court shall also have power to administer oaths and to give certificates thereof; to issue summons, writs, warrants, executions and all other process necessary to enforce its orders and judgments (Id).

3. Procedure

SEC. 130. **In General.** All proceedings and and prosecutions for offenses against the laws of the Philippine Islands shall conform to the rules relating to process, pleading, practice, and procedure now or hereafter established for the judiciary of the Islands, and such rules shall govern said police court and its officers in all cases in so far as the same may be applicable. (Id).

SEC. 131. **Process.** In a prosecution for the violation of any ordinance, the first process shall be a summons: *provided, however*, That a warrant for the arrest of the offender may be issued in the first instance upon the affidavit of any person that such ordinance has been violated, and that the person making the complaint has reasonable grounds to believe that the party charged is guilty thereof; and such warant shall conclude: "against the ordinances of the city in such case made and provided." (Id).

SEC. 132. **Appearance: Preliminary Investigation.** Every person arrested shall, without unnecessary delay, be brought before a municipal court or a court of first instance for preliminary hearing, release on bail, or trial. It shall not be within the power of a defendant in the municipal court in a case triable in that court to demand a preliminary examination, except a summary one, the extent of which shall be within the discretion of the court, to enable the court to fix the bail, in any case where the prosecution announces itself ready and is ready for trial within three days, not including Sundays, after the request for a preliminary examination is presented to the court. (Act. 183 sec. 40, as amended by Act. 612, sec. 2).

SEC. 133. **Fines, Fees and Costs.** There shall be taxed against and collected from the defendant, in case of his conviction in said court, such costs and fees as may be prescribed by the board, which costs and fees, shall not exceed those charged in criminal cases in justices' courts[1]. All fines and forfeitures, fees, and costs imposed shall be collected by the clerk of the court, who shall keep a docket of all fines, forfeitures, costs, and fees imposed, and of those collected, and shall pay collections of the same to the collector, of internal revenue[2] for the benefit of the city, on the next business day after the same are collected and receive receipts therefor. The judge shall examine the docket of fines, forfeitures, fees and costs each day, compare the same with the amount receipted for by the collector of internal revenue and satisfy himself that all fines, forfeitures, fees, and costs have been duly accounted for. (Act 183; sec. 40).

1 See *ante* sec. 15. Under Act 190, sec. 493, costs in municipal courts are required to be the same as "in an action pending before a justice of the peace."

2 Act 1407, sec. 21.

SEC. 134. **Enforcement.** The judgment of the court may be enforced by imprisonment of any defendant adjudged guilty therein until the fines, * * *[1] assessed have been paid, or until the same shall have been satisfied by imprisonment at hard labor at the rate of twenty five cents a day; and any such judgment[2] may also be enforced by execution against the property of the defendant adjudged guilty therein. (Id.)

1 Payment of costs cannot be enforced by imprisonment. (Op. Atty. Gen.) 3 Off. Gaz. 591.

2 Including fees and costs. But if defendant is insolvent there is no remedy. (Id. 185.)

SEC. 135. **An Appeal** shall lie to the court of first instance next to be held within the city, in all cases * * *[1] where fine or imprisonment, or both, is imposed by the municipal court. To perfect an appeal, the party desiring to appeal shall, before 6 o'clock P. M. of the day after the rendition and entry of the judgment by the municipal court, file with the clerk of the court a written statement that he appeals to the court of first instance. The filing of such statement shall perfect the appeal. The judge of the court * * * shall, within five days after

1 Portion indicated by * * * is rendered inoperative by U. S. v Kepner, 195 U. S. 100; 24 Sup. Ct. Rep. 797, reversing 1 Phil. 397,727.

the appeal is taken, transmit to the clerk of the court of first instance a certified copy of the record of proceedings and all the original papers and process in the case, and the clerk of the court of first instance shall docket the appeal in that court[1]. A perfected appeal shall operate to vacate the judgment of the municipal court, and the action, when duly entered in the court of first instance, shall stand for trial *de novo* upon its merits in accordance with the regular procedure in that court, as tho the same had never been tried and had been originally there commenced. Pending an appeal, the defendant shall remain in custody unless released in the discretion of the judge of the municipal court or of the judge of the court of first instance upon sufficient bail, in accordance with the rules and regulations now or hereafter in force, to await the judgment[2] of the appellate court. (Act 612 sec. 4).

1 The appeal cannot be withdrawn. Bautista v. Johnson 2 Phil. 230; 1 Off. Gaz. 550.

2 No appeal lies beyond the court of first instance except where validity or constitutionality of statute or ordinance is in question. U. S. v. Jeng. 2 Phil. 179. Cf. *ante* sec 71.

Petition for mandamus to compel first instance judge to allow appeal must allege existence of such question. Legaspi v. Sweeney, 5 Phil. 157; 4 Off. Gaz. 522.

PART THREE

ELEMENTS OF EVIDENCE.

TITLE I.

INTRODUCTORY.

"The rules of evidence", declares the Code of Civil Procedure[1], "shall be the same in all courts of the Islands". Two brief sections of the code[2] prescribe the rules for the *production* of evidence before justices of the peace, but both are more summaries of the general provisions found in subsequent chapters[3] and, except those relating to the perpetuation of testimony, there are none of those provisions which might not be applicable to a proceeding before a justice. But it is not merely for justices of the peace that these provisions deserve to be clarified. No branch of our jurisprudence is more in need of simplification, of clear and concise expression, of logical and orderly arrangement, than our law of evidence. The importation of that branch was the most radical change wrought by American legislation in the private law of the archipelago. Nothing approaching it existed in Spanish jurisprudence[4]. The English law of evidence is an unique product of the growth of centuries under peculiar conditions. It is highly important for all classes that, in adapting it to a new field, it be shorn of all accidental or unnecessary appendages, and made certain and intelligible. The American and English text books on the subject are proverbially unsatisfactory to one approaching it for the first time. They mostly assume a knowledge of technical phraseology on the part of the reader and are voluminous in scope, presenting a mass of detail whose inevitable effect is to bewilder the beginner. Yet the subject is reducible to a

1 Sec. 274.

2 Secs. 63, 68.

3 X, XIII, XVI.

4 *Compare* the meager provisions on the subject in the Civil Code. The Spanish Code of Civil Procedure (Bk II, Tit. II, Ch. II, sec. 5) contained more but it seems that there is in Spanish no modern treatise on "*Pruebas*" except a few translations from other languages. See Buylla and Pasada's edition of Ricci, Tratado de las Pruebas, p. 9.

comparatively small number of elementary principles which, once mastered, constitute a key to their multitudinous application of which the text books treat. The purpose of this brief treatise is to provide that key. The need of a codification of these principles has long been recognized by progressive Anglo-Saxon jurists. Not to mention Bentham, the late Sir James F. Stephen, as early as 1871, drafted such a code which became the Indian Evidence Act and was also published in text book form[1] as a summary of the subject.

In 1872 the California legislature adopted a new Code of Civil Procedure which included a considerable section devoted to evidence. This was revised and amended in 1901 and became the principal source of the evidence provisions in the present Philippine procedure code. The author has not, however, confined himself to these provisions in preparing this treatise because they do not purport to be complete and because the supreme court appears to recognize the doctrine that, by importing this branch of the law, our legislators imported it as a whole and not merely that fragment which had been expressed in statutory form.[2] Neither have the language and arrangement of existing provisions been followed if otherwise a gain in clearness, brevity, or logical order seemed possible. The Filipino people, accustomed to finding its law in the form of codes which are models of the art of expression and often of arrangement, is entitled to have its probatory law similary stated.

On the other hand there are some features of the Anglo-American law of evidence which have been outgrown and discarded in the lands of its origin, as well as much that seems ill adapted to the Philippines. It is a question, *e. g.*, how far we should apply the strict rules requiring the exclusion of hearsay, which are wholly a product of the jury system[3], in a country where that system has never obtained.

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1 See Chase's (2nd American) Edition, New York, 1898. Judge Stephen's work is criticised as "injured by the small consideration he shows for the historical aspect of the matter and by the over-ingenious attempt to put the rules of evidence wholly into terms of relevancy." (Thayer's Cases, p. 3 n.)

2 This appears to be the effect of U. S. v. Montes, 6 Phil. 443; 5 Off Gaz. 88 and U. S. v. Palanca 5 Phil. 269; 4 Off. Gaz. 193, where the rule as to "dying declarations" which had never been enacted here, is, nevertheless, stated and applied.

3 "Upon this subject the laws of other countries are quite different; they admit evidence of hearsay without scruple. There is not an appeal

Rules of a local or antiquated sort are omitted here. Important principles not expressly reenacted in this jurisdiction are indicated by brackets. In stating a doctrine which has been codified in the Philippines, the number and section of the act is given as well as of the parent California code when such is the source, and often reference to a text-book stating the common law principle. The commentator most frequently cited is Prof. John H. Wigmore, whose personal acquaintance the author has had the good fortune to enjoy for a dozen years, and whose recent (1904) monumental work supersedes all others and constitutes the most profound, philosopical and exhaustive treatise on the subject. References to Greenleaf are also to Prof. Wigmore's edition (1899). Thayer's Cases on Evidence, are cited as the best repository of the sources—the leading common law cases—and the Encyclopedia of Evidence as the most comprehensive and voluminous digest.

TITLE II

NATURE AND EFFECT.

SEC. 136. **Definition.** Evidence is the chief[1] means by which the existence or non-existence of an alleged fact is established in a judicial proceeding[2]. Testimony is evidence given by a witness.

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from the neighboring kingdom of Scotland in which you will not find a great deal of hearsay evidence upon every fact brought into dispute. This has struck many persons as a great absurdity and defect in the law of that country. But the different rules which prevail there and with us seem to me to have a reasonable foundation in the different manner in which justice is administered in the two countries. In Scotland, and most of the Continental States, the judges determine upon the facts in dispute as well as upon the law; and they think there is no danger in their listening to evidence of hearsay because, when they come to consider of their judgment on the merits of the case, they can trust themselves entirely to disregard the hearsay evidence, or to give it any little weight which it may seem to deserve. But in England, where the jury are the sole judges of the fact, hearsay evidence is properly excluded, because no man can tell what effect it might have upon their minds." Mansfield, C. J., in Berkeley Peerage Case, 4, Camph. 401, 416; Thayer's Cases, 373, 375; cf. id. p. 306 n., where the author says: "As a matter of sound reason hearsay is often good evidence." See Farber v. Mo. P. R. Co., 139 Mo. 284. Hearsay is admissible in the civil law (Ricci, Tratado de las Pruebas [Ed. of Buylla y Posada] p. 397) and was used under the Spanish procedure. U. S. v. Tanjuanco 1 Phil. 374.

1 Other means are specified in secs. 143-145 *infra*. Argument is also sometimes referred to as one of these means.

2 A collection of definitions, arranged in historical order, will be found in 1 Wigmore, Ev. pp. 3 to 5.

SEC. 137. **Opinions.** Testimony must ordinarily consist of statements of ultimate facts, based upon personal knowledge. The conclusions or opinions of a witness are not evidence[1] except in the following instances:

1. The opinion of an expert in science[2], art, industry, or language, on a question relating to his particular branch[3], including the law of a country outside the Philippines.

2. The opinion of a subscribing witness relative to the mental sanity of the signer of the document whose validity is disputed.

3. The opinion of an intimate adquaintance of a person relative to the latter's handwriting or sanity, the reasons for the opinon being given.

(Act 190, secs. 276, 298, (9, 10) 302; Cal. Code C. P., 1870 (9, 10), 1902; Wigmore, Ev. sec. 1917 *et seq.*)

1 Pastor v. Gaspar, 2 Phil. 592; 1 Off. Gaz. 875. Mere opinion as to cause of an accident is not evidence. City of Manila v. Rodriguez, 7 Phil, 292; 5 Off. Gaz. 101.

2 *E. g.* the permanency of an injury. U. S. v. Mercado, 4 Phil. 304; 3 Off. Gaz. 365.

3 See the author's article "Expert and Opinion Evidence", 12 Am. & Eng. Enc. of Law (2d ed.) 414.

SEC. 138. **Classes.** Besides *oral* (testimony) evidence may be *documentary* (writing), *real* or *demonstrative* (miscellaneous objects[1]). It is called *corroborative*[2] when it tends to support other evidence, and *cumulative* when it is of the same kind to the same point as that already produced: *prima facie* when it suffices for proof until overcome by other evidence[3], and conclusive[4] when it cannot be contradicted. It may be *direct* (leading to the result without the necessity of inference): or *circumstantial*[5] (merely establishing facts from which the result may be inferred[6]).

1 E. g. the weapon offered in a murder case. See *post*. sec. 215.

2 In the civil law adminicular.

3 Act 190, sec. 280.

4 See II Wigmore, Ev. sec. 1345 *et seq.* Under sec. 47 of Act 496 certificates of title pursuant to decrees of registration are conclusive except, (sec. 55) when procured by fraud. See Broce v. Broce, 4 Phil. 611; 3 Off. Gaz. 622.

The legal force of documents cannot be ignored. Lerma v. Alvarez 6 Phil. 202. Cf. Alo v. Rocamora, Id. 197. The testimony of experts is not conclusive upon the courts. U. S.v. Trono, 3 Phil. 213; 2 Off. Gaz. 213.

5 Conviction may be based on this class of evidence. I Wigmore Ev. sec. 38 *set seq*; Ley Provisional, art. 52; U. S. v. Perez, 2 Phil. 171; U. S. v. Castillo, 6 Phil. 453; 4 Off. Gaz. 688; U. S. v. Miranda, 2 Phil. 606; 1 Off. Gaz. 911. But circumstantial evidence must exclude every other reasonable hypothesis. U. S. v. Un Che Sat, 5 Phil. 274; 3 Off. Gaz 721; U. S. v. Douglass, 2 Phil. 461; 1 Off. Gaz. 708; U. S. v. Villos, 6 Phil. 510; 4 Off. Gaz. 689; U. S. v. Palanca, 5 Phil. 269; 4 Off. Gaz. 193. Conspiracy need not beproved by di-

rect testimony. U. S. v. Maaño, 2 Phil. 718; 2 Off. Gaz. 30; U. S. v. Bautista 6 Phil. 581; 4 Off. Gaz. 706. Circumstantial evidence is not received in all systems. See Reinsch, Colonial Government, citing Baillie, Mohammedean Law.

6 Any facts are admissible from which those in issue "are logically inferable". Act 190, sec. 298 (15); Cal. Code C. P. sec. 1870, (15).

NECESSITY AND SUFFICIENCY.

SEC. 139. **Onus Probandi.** A party must establish every *material* (essential) allegation of his pleading[1]. The burden of proof[2] as to any particular point or issue rests upon the party who would fail if no evidence thereon were offered[3].

1 Act 190, secs. 295, 297; Cal. Code C. P., secs. 1867, 1869; De Guzman v. Rivera, 4 Phil. 620; 4 Off. Gaz. 530.

A judgment for damages must rest upon satisfactory proof of their existence. Sanz v. Lavin 6 Phil. 299.

Under Act 190, sec. 297, evidence need not be offered in support of a negative allegation unless it is essential to a statement of the cause of action or defense, nor even then if it consists in the denial of the existence of a document in the adverse party's custody.

2 See the critical discussions of this phrase in Thayer's Cases pp. 69 *et seq*; IV Wigmore, Ev. secs. 2483 *et seq*. The "two burdens of proof" mentioned by the learned authors are not applicable in this jurisdiction since, in the absence of the jury system, the only burden is the "duty of producing evidence to the judge."

3 Best, Ev. (1849) sec. 268; Cal. Code, C. P. sec. 1981.

"It is often said that the burden is upon the *party having the afirmative allegation*, but this is not an invariable test, nor even always a significant circumtance; the burden is often on one who has a negative assertion to prove." IV Wigmore, Ev. sec. 2486.

A debtor alleging payment has the burden of proving it. Behn Meyer & Co. v. Rosatzin 5 Phil. 660; 4 Off. Gaz. 292.

The burden is upon the employer to prove that an employee did not diligently seek other employment after wrongful discharge. Aldaz v. Gay, 7 Phil. 268; 5 Off. Gaz. 164.

SEC. 140. **Quantum of Proof.** In civil actions a preponderance, only, of the evidence is required.[1] In criminal prosecutions[2] the guilt of the accused must be established beyond a reasonable doubt.[3]

1 IV Wigmore, Ev. sec. 2498.

2 Id. sec. 2497; G. O. 58, sec. 57; Ley Provisional art 52 (3); U. S. v. Bosito 4 Phil. 100; 3 Off. Gaz. 112; U. S. v. Aliño; 4 Phil. 181; 3 Off. Gaz. 246; U. S. v. Lopena, 4 Phil. 224; 3 Off. Gaz. 251; U. S. v. Gutierrez, 4 Phil. 493; 3 Off. Gaz. 541; U. S. v. Trinidad, 4 Phil. 152; Off. Gaz. 142. U. S. v Balboa, 2 Phil. 165; U. S. v. Santa Maria 6 Phil. 414; 4 Off. Gaz. 363.

Contradicted testimony of a single witness held insufficient to convict of bigamy. U. S. v. Ageaoili, 4 Off. Gaz. 731.

Identification of accused by sound of voice sufficient where witness was intimately acquainted with him for years. U. S. v. Manabat, 7 Phil. 209; 5 Off Gaz. 24. But see U. S. v. Ramos, 4 Phil, 389; 3 Off. Gaz. 372.

3 "Reasonable Doubt" defined. U. S. v. Reyes, 3 Phil. 3; 2 Off. Gaz. 7; U. S. v. Douglass, 2 Phil. 461; 1 Off. Gaz. 708.

SEC. 141. **The Preponderance of Testimony** is determined not alone by the number of witnesses, but also by their appearance and demeanor on the stand, their manner of testifying, and, so far as legitimately disclosed at the trial, their interest and credibility,[1] their intelligence and capacity, the nature of the facts to which they testify and their opportunities of knowing the same, together with the general probability of their statements. (Act 190, sec. 273; Ga. Code, sec. 5146.)

1 The circumstances may be such as to justify the trial court in wholly disregarding certain testimony. U. S. v. Vargas, 5 Phil. 136; 4 Off. Gaz. 520.

On Appeal "the Supreme Court may review the evidence taken in the court below and after giving due weight to the fact that the judge who tried the case saw the witnesses when they testified (a) affirm or reverse, by a preponderance of the evidence, or modify by such preponderance, the judgment there rendered (b). (Act 1596, sec. 1).

(a) U. S. v. Plana, 2 Phil. 9. Cf. De la Rama v. De la Rama, 201 U. S. 303.

(b) Under a subsequent paragraph of the same section the supreme court may permit new evidence to be taken and a commissioner may be appointed for that purpose. See Chanco v. Madrilejos 5 Phil. 319; 3 Off. Gaz. 723.

SEC. 142. **Corroboration.** The evidence of a single witness may ordinarily establish any fact.[1] But extra-judicial confessions[2]

1 III. Encyclopedia of Evidence, 672. One witness, corroborated by circumstantial evidence, is sufficient to convict. U. S. v. Cabe, 1 Phil. 265; 1 Off. Gaz. 493; U. S. v. Dacotan, 1 Phil. 669; U. S. v. Bastas, 5 Phil. 251; 4 Off. Gaz. 190. But not if uncorroborated. U. S. v. Asiao, 1 Phil. 304; U. S. v. Santa Cruz Id. 726; U. S. v. Samarin, id. 239; (*corpus delicti* not proved); U. S. v. De la Cruz, 4 Phil. 438; U. S. v. Quiamson, 5 Phil. 444; 4 Off. Gaz. 70. Evidence of confession, corroborated by written request for pardon, will support conviction. U. S. v. Sotelo, 1 Phil. 544.

In the Roman Law and systems based thereon, (such as the Spanish) at least two witnesses were usually required, the maxim being *testis unus, testis nullus.* Cavalier v. Collins, 3 Mart. (La. O. S.), 188.

In many jurisdictions corroboration is required by statute in certain crimes and actions. See the author's article on Corroboration, III Encyclopedia of Evidence, 667.

2 I. e. those made outside of court. U. S. v. De la Cruz, 2 Phil. 148.

must be corroborated by proof of the *corpus delicti*[1]. No person shall be convicted of treason by any tribunal, civil or military, unless on the testimony of two witnesses to the same overt act or on confession in open court[2]. Conviction of the crimes of perjury[3] and rape[4] requires other evidence than the testimony of one witness, nor can the accused be convicted upon the testimony of an accomplice alone[5].

1 III. Encyclopedia of Evidence 681. "*Corpus delicti*" means fact that crime was committed.

2 U. S. Const. Art. III, sec. 3; Act of Congress of Mch. 3, 1902, sec. 9; III Encyclopedia of Evidence, 716. U. S. v. de los Reyes, 3 Phil. 349; U. S. v. Magtibay, 2 Phil. 703; 1 Off. Gaz. 932.

3 U. S. v. Lozano, 7 Phil. 142; 4 Off. Gaz. 753; U. S. v. McGovern, 4 Phil. 451; 3 Off. Gaz. 410; III Encyclopedia of Evidence, 696.

The prisoner's confession will not, in the absence of a statute authorizing it, support a conviction of this crime. Swartz v. State, 27 Gratt. (Va) 1025; 21 Am. Rep., 365.

Accused cannot be convicted of perjury where witnesses and probabilities are about equally divided. U. S. v. Antonio, 1 Phil. 251; 1 Off. Gaz. 480.

4 U. S. v. Flores, 6 Phil. 420; 4 Off. Gaz. 581; 1 Greenleaf, Ev., 260b.

5 1 Greenleaf, Ev. sec. 380. Cf. U. S. v. Magtibay, 2 Phil. 703; 1 Off. Gaz. 932; U. S. v. Ocampo, 5 Phil. 339; 4 Off. Gaz.8; U. S. v. Dadacay, 6 Phil. 1; 5 Off. Gaz. 38; U. S. v. Yu-To Chay, 4 Phil. 613; 4 Gaz. Off. 176; U. S. v. Lim Tico, 4 Phil. 440; 3 Off. Gaz. 408. But see U. S. v. Balisacan, 4 Phil. 545; 4 Off. Gaz. 169.

SEC. 143. **What need not be proved:**

1. *Facts judicially noticed*, including:

a *Political*. The existence, titles, boundaries, and territorial extent of sovereign states, their forms of government, symbols of nationality, the status of their dependencies, the political subdivisions of the Philippine Archipelago as fixed by statute, and the seals of the several American States.

b *Legal*. International law, the general maritime law, and the jurisdiction, rules of procedure, and seals of all courts administering the same; the law merchant, treaties between the United States and foreign powers, and the public acts and proclamations for carrying them into effect, the constitution and public laws of the United States and the entire domestic law.

c *Official*. The existence, powers and duties, personnel, seals, terms of office including commencement and end, date and result of election or appointment of all officers, including judges, provided for by the laws of the United States and of the Philippine Archipelago; official acts, proceedings of general, public interest including any official census or survey, legislative journals, and the administrative regulations of the executive departments of the federal and insular governments.

d *Physical*. The laws and course of nature, the succession of the seasons, the movements of celestial bodies, the general properties of mat-

ter, the common facts relating to animal and vegetable life, the law of average as established by statistics, the physical features of the United States and of the Philippine Islands, the ports and tidewaters thereof, and the distance and time of travel between the various localities thereof.

e *Social and industrial* customs prevailing generally thruout a community, the vernacular language and the meaning of ordinary words, phrases and abbreviations therein; the computation of time, the legal standard of weights, measures and values, the circulating medium, matters of public history and of the local history of communities within the court's jurisdiction[1], and, generally, matters within the common experience or knowledge of persons of ordinary inteligence. (Act 190, sec. 275; Cal. Code C. P. sec. 1875, 16 Cyc. of Law and Proc. 849).

1 U. S. v. Tubig 3 Phil. 258; 2 Off. Gaz., 202).

SEC. 144. **2. Same: Facts Presumed**[1]. The following are presumed and need not be proved unless contradicted by the evidence:

a *Regularity and Normality.*

(1) *Generally.* That events have occurred according to the ordinary course of nature or of business[2]; that a letter or telegram[3] duly sent was received in due course; that the law has been observed; that a person is innocent of wrong[4]; that a fact or condition, of a continuous nature, once proved to exist, continues; that acquiescence in a fact or condition resulted from belief in its correctness; and that private transactions have been fair and regular.

(2) *Official duty.* That one acting as a public functionary[5], or tribunal, is in the lawful exercise of his functions and jurisdiction and that official (including judicial) acts and proceedings are regular; that a conveyance of real property, made the duty of a trustee or other person, and necessary to protect the beneficiary's title, has actually been made, and that all matters which were, or might have been, in issue in an action or other judicial or quasi-judicial proceeding, were laid before the tribunal which heard the same and were passed upon by it.

(3) *Status, etc.* That persons acting as partners are such; that a man and woman deporting themselves as husband and wife are lawfully mar-

1 **Presumptions** have sometimes been classified (Act 190 secs. 333, 334), as *rebuttable* (or disputable) and *conclusive*. But it is manifest that the latter is a misnomer since whatever is *concluded* against one's adversary is no longer a mere presumption. See IV Wigmore, Ev. sec. 2492. Another classification is into presumptions of law and of fact, but the former only (i. e. consequences attached by law) are true presumptions. See Thayer's Cases on Ev. p. 38 *et seq*; I Wigmore's Greenleaf sec. 14w.

2 U. S. v. Lugo, 5 Off. Gaz. 263 & cit.

3 22 Am. & Eng. Encyc. of Law (2nd ed.) p. 1256.

4 U. S. v. Aliño, 4 Phil. 181; 3 Off. Gaz. 246; U. S. v. Lopena, 4 Phil. 224; 3 Off. Gaz. 251. Intoxication of an accused is presumed not to be habitual. U. S. v Fitzgerald 2 Phil. 419; 1 Off. Gaz. 649. Presumption of a woman's virginity arises from proof that she is unmarried. U. S. v. Alvarez, 1 Phil. 351.

5 U. S. v. Weems, 7 Phil. 241; 5 Off. Gaz. 58.

ried[1]; that a child is legitimate if born in lawful wedlock or within three hundred days after its expiration; that an adult male is capable of procreation[2], that a person is under no legal disability; that he owns property which he holds[3] or exercises dominion over, exercises ordinary care to preserve his life and manage his own concerns, and intends the ordinary consequences of his voluntary acts.[4]

(4) *Writings, etc.* That a writing is duly dated: that the indorsement of a negotiable promissory note or bill was made at the place but after the time of executing the instrument, and that such indorsement and execution as well as the making of all written contracts were for a valid consideration[5]; that a document more than thirty years old, whose custody is satisfactorily explained, and which is generally received by parties interested therein as genuine, is such; that the terms of a written instrument are used in their ordinary and generally accepted meaning in the place of its execution,[6] and that if printed words, inconsistent with the written, are used, the latter were intended to control;[7] that all provisions of such instrument were intended to be effective[8] but that a particular provision or intent should prevail over a general and inconsistent one;[9] that ambiguous language was intended to be construed in favor of, rather than against, a natural right,[10] against the party who originated the phraseology and in favor of the one for whose benefit it was used[11] that; a written obligation, surrendered to the debtor, has been paid and that instalments of a debt have been paid if receipt for a subsequent one is produced; that a published work, purporting to be printed by public authority in any country, is such, and that reports of judicial decisions[12] or copies of laws which it purports to contain are correct.

b *Identity.* That persons and things of the same name are identical, and that the substantive law of other civil law countries is the same as that prevailing in this jurisdiction.

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1 U. S. v. Villafuerte, 4 Phil. 559; 3 Off. Gaz, 574, 589.

2 72 Am. & Eng. Encyc. of Law (2nd ed.) 1286, notes 2, 3.

3 Personal property in accused's possession will be presumed to have been acquired in good faith. U. S. v. Rapiñan, 1 Phil. 294 Property acquired during marriage is presumed to be conjugal (Leonardo v. Santiago, 7 Phil. 401; 5 Off. Gaz. 148) but this, like the general presumption, may be rebutted. Co-Boo v. Lim Tian 3 Phil. 190; 2 Off. Gaz. 465.

4 Act 190, sec. 334 [3]; Penal Code, Art. 1; U. S. v. Fitzgerald, 2 Phil. 419; 1 Off. Gaz. 649.

5 Act. 190, sec. 334; Civ. Code, Art. 1227; Sparrevohn v. Bachrach; 7 Phil. 194, 5 Off. Gaz. 8.

Strong proof is required to overcome the recitals of a public instrument. Naval v. Enriquez, 3 Phil. 669, 2 Off. Gaz. 610.

6 Act 190, sec. 286.

7 Id. sec. 291.

8 Id., sec. 287.

9 Id., sec. 228.

10 Id., sec. 294.

11 Id., sec. 293.

12 IV Wigmore, Ev. sec. 2536.

c *As to Misconduct.* That an unlawful act was committed with unlawful intent, that evidence wilfully suppressed would be adverse[1], and that one in possession of the fruits of a crime is implicated therein[2].

d *As to Death and Survivorship.* That a person is dead who has not been heard from for seven years[3], or whose will has been admitted to probate, or for whose estate an administrator has been appointed[4]; and where two persons perish in a common disaster, that (1) the elder survived longer if both were under fifteen, (2) the younger if both were over sixty, or one under fifteen and the other over sixty, (3) the male if both were between fifteen and sixty, or the elder if the sex were the same, (4) the one between fifteen and sixty if the other was over or under[5]. (Act 190, sec. 334; Cal. Code, C. P. sec. 1963; 16 Cyc. of Law & Procedure, 1050; IV Wigmore, Ev., sec. 2499 *et seq.*)

1 Cason v. Rickards 5 Phil. 611; 4 Off. Gaz. 236 (failure to produce books claimed to show owner's liability). But mere non-appearance of witness raises no presumption; it must be shown that the testimony was wilfully suppressed. U. S. v. Abuan, 2 Phil. 130; Modesto v. Leyva, 6 Phil. 186.

2 I Greenleaf, Ev. sec. 34.

3 Act 190 sec. 334 (24). But compare sec. 656.

4 Act 190, sec. 306 (1)

5 Such is the general civil law rule. In common law countries the approved presumption seems to be that both perished together. I Greenleaf Ev. sec. 30. By the Mohammedan Law there is no presumption. Baille Mohammedan Law of Inheritance, 172.

SEC. 145. **Facts admitted,** either expressly or by failure to deny, when well pleaded, need not be proved[1]. [But no decree of divorce can be based solely upon the confession of the respondent[2].]

1 IV Wigmore, Ev. sec 2588 *et seq.* Cf. Act 190, sec. 326; Alemany v. Sweeney, 3 Phil. 114, 2 Off. Gaz. 110.

Where the accused pleads guilty, even the death penalty may be imposed without taking evidence. U. S. v. Talbanos 6 Phil. 541; 4 Off. Gaz. 695. Cf. U. S. v. Molo, 5 Phil. 412; 4 Off. Gaz 57.

2 Such appears to be the Anglo-American rule as derived from the Canon Law (III Wigmore, Ev. sec. 2067; Cal. Code, C. P. sec. 2079) which, in part at least, is in force in the Philippines. See Willard's Notes, p 15.

SEC. 146. **Stranger's Admissions.**

The declaration, act or omission of one person is not binding upon another[1] except by virtue of the relations mentioned in sec. 151. (Act 190, sec. 277; Cal. Code C. P. sec. 1848).

1 Confessions are not admissible against a co-defendant. U. S. v. Castillo. 2 Phil. 17; U. S. v. Lim Tico, 4 Id. 440; 3 Off. Gaz. 408; U. S. v. Paete, 6 Phil. 105; 5 Off. Gaz. 70; U. S. v. Candeleria, 4 Phil. 543; 4 Off. Gaz. 169. Recitals in a public instrument are not binding upon a stranger.

Aldeguer v. Hoskin, 2 Phil. 500; 1 Off. Gaz. 727. An unaccepted commission issued to one accused of conspiracy is not competent evidence against him. U. S. v. Villariño, 5 Phil. 697; 5 Off. Gaz. 37.

Public instruments are admissible, even against third parties, as to the date of their execution and the facts giving rise thereto. Cacnio v. Baens 5 Phil. 742.

TITLE III

ADMISSIBILITY.

PRINCIPLES OF EXCLUSION.

1. Fundamental Requirements.

SEC. 147. **Evidence must be pertinent and relevant to the material issues raised by the pleadings.**

(Act 190, secs. 296, 298 (1); Cal Code C. P. secs. 1868, 1870 (1); G. O. 58, sec. 59; I Wigmore, Ev. sec. 27, 4 Off. Gaz. 17. Cf. Lim-Chingco v. Terariray, 5 Phil. 120; 3 Off. Gaz. 687; Frankel v. Clarke 5 Phil. 349; 4 Off. Gaz. 17).

It is, however, discretionary with the court to permit inquiry into a collateral fact directly connected with the issues and essential to their proper determination. (Act 190, sec. 296.)

Where the question in dispute is the obligation of a third person, whatever would be evidence for or against him is admissible as between the parties. (Act 190, sec. 28; Cal. Code C. P. sec. 1851).

Usage is admissible but only as an instrument of interpretation. (Act 190, sec. 298 (12); Cal. Code C. P. sec. 1870 (12.)

Erroneous admission or exclusion of evidence, if prejudicial, is reversible error (Infante v. Figueras, 4 Phil. 738; 4 Off. Gaz. 210) unless the result would be the same regardless of such evidence. U. S. v. Sison, 6 Phil 421; 4 Off. Gaz. 602: Panaguiton v. Watkins, 5 Phil. 539.

Only evidence actually admitted can be considered. Dayrit v. Gonzales, 7 Phil. 182; 5 Off. Gaz. 53.

SEC. 148. **Evidence must be the "best" (most original or primary[1]) attainable.**

(I Greenleaf Ev., Ch. VIII; Thayer's Cases, pp. 778 *et seq.*, G. O. 58; sec. 59.)

See II Wigmore, Ev. sec. 1173 *et seq.* where the use of the phrase is criticised.

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1 Not necessarily the most convincing, tho the word seems to have been so used in U. S. v. de Sosa, 1 Phil. 687, where the court said that the "best evidence" of one's disappearance is testimony of members of his family.

HEARSAY EXCLUDED.

SEC. 149. **General Rule.** Statements, oral or written, by one not called as a witness, are deemed hearsay[1] and are generally inadmissible[2].

(Act 190, secs. 276-7; II Wigmore, Ev. secs. 1360 *et seq.*; Stephen's, Digest of the Law of Ev., Art. 14; see *ante* p. 82n.)

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1 Pastor v. Gaspar 2 Phil. 600; Ismael v. Guanzon, Id. 347; Cruz v. Joaquin, Id. 503; U. S. v. Tanjuanco, 1 Phil. 374; Richmond v. Anchuelo, 4 Phil. 596; 3 Off. Gaz. 605; U. S. v. Dayutal, 4 Phil. 93; 3 Off. Gaz. 48; U. S. v. Santiago, 4 Phil. 439; 3 Off. Gaz. 527.

2 *The reason* for the rule is the unreliability of statements made without the sanction of an oath or the opportunity of cross-examination which, and not trial by jury, as Professor Wigmore well says "is the great and permanent contribution of the Anglo-American system of law to improved methods of trial procedure." II Ev. sec. 1367. Cf. Id. sec. 1362; I Greenleaf, Ev. sec. 98).

EXCEPTIONS.

A considerable part of the field of evidence is occupied with exceptions to the hearsay rule. These exceptions are mainly on two grounds: (1) Trustworthiness; (2) Necessity. Each in a measure takes the place of cross-examination, the benefits of which afford the principal basis of the "Hearsay Rule."

The exceptions may be classified under two heads according as they rest mainly upon either of the above grounds:

(1) *Exceptions principally on the ground of trustworthiness.*

SEC. 150. **Declarations Against Interest.** The declaration, entry, act, or omission of a decedent, having sufficient knowledge of the subject, against his pecuniary interest, is, to that extent, admissible against his successor in interest. (Act 190, secs. 282, 298 (4) (Cf, 328 (1)): Cal. Code C. P. 1853, 1870 (4), 1946 (1); II Wigmore, Ev. sec. 1455 *et seq;* I Greenleaf, Ev. Ch. XIII).

County of Mahaska v. Ingalls 16 Ia. 81; Thayer's Cases 502, (1864); Leonardo v. Santiago, 7 Phil. 401; Off. 5 Gaz. 148.

SEC. 151. **Admissions.** A declaration, act or omission against his own interest, made by a party himself[1] or, actually or constructively, by his authority[2], or by one identified in interest with him[3] as agent, grantee, partner, co-owner, co-obligor, or, in a criminal cause, as co-conspirator, or otherwise, and within the

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1 Oas v. Roa, 7 Phil. 20; 4 Off. Gaz. 734.

2 U. S. v. Gooding, 12 Wheat. (U. S.) 460; Thayer's Cases, 118 (1827).

An admission by counsel in one case is not evidence against his client in another. De la Rama v. Benedicto, 5 Phil. 512; 4 Off. Gaz. 142.

3 Woolway v. Howe, 1 A & E (Eng) 114; Thayer's Cases, 120 (1834).

scope of such relation, or acquiesced in by such party, by silence when it was his duty to speak, or otherwise, is admissible in evidence against him[1], or, if made in respect to property while the declarant holds title thereto[2], against his successor in interest. (Act 190, secs. 277, 278, 298 (2, 3, 5, 6); Cal. Code C. P. secs. 1848, 1849, 1870 (2, 3, 5, 6); II Wigmore, Ev. sec. 1069 *et seq.*)

1 He may, of course, offer evidence to meet it. Evangelista v. Bascos, 3 Off. Gaz. 656; Oas v. Roa. 7 Phil. 20; 4 Off. Gaz 734.

2 Manila v. Del Rosario, 5 Phil. 227; 4 Off. Gaz. 189.

SEC. 152. **Exception:** *An offer of compromise* is not admissible. (Act 190, sec. 346; Cal. Code C. P. 2076; Manila v del Rosario, 5 Phil. 227; 4 Off. Gaz. 189).

SEC. 153. [**Dying Declarations.** In prosecutions[1] for *asesinato* or *homicidio* the voluntary statement of the deceased as to the cause of death or any circumstance connected therewith, is admissible, if made while the deceased was of sane mind, conscious of approaching death, and without hope of recovery[2].] (II Wigmore, Ev. sec. 1430 *et seq;* I Greenleaf, Ev. Ch. XIV; Stephen, Dig. of Ev., Art. 26).

This principle is not expressly embodied in the Philippine Code, having been omitted from sec. 1870 (4) of the California Code, the original of sec. 298 (4) of the former The rule has nevertheless been adopted here by judicial decision. U. S. v. Montes; 6 Phil. 443; 5 Off. Gaz. 88; U. S. v. Palanca, 5 Phil. 269; 4 Off. Gaz. 193.

There was a similar principle in the Roman Law. Mascardus, De Probatione, concl. 1080.)

1 Wilson v. Boerem 15 Johns. (N. Y.) 286; Thayer's Cases 358 (1818).

2 Com. v. Haney 127 Mass. 455; Thayer's Cases 369 (1879).

(2) *Exceptions principally on the ground of necessity or convenience.*

SEC. 154. **Matters of Public and General Interest.** Common reputation[1] existing previous to the controversy is admissible respecting matters of public and general interest[2] more than thirty years old. (Act 190, sec. 298, (11), 334 (11); Cal. Code C. P. sec. 1870 (11), 1963 (12); I Greenleaf, Ev. ch. XII.)

1 I. e. "the common knowledge of the community." Smith v. Compton 67 N. J. L. 557, It means "universal reputation". Manila v. Del Rosario, 5 Phil. 217; 4 Off. Gaz. 189. Monuments and inscriptions in public places are admissible as evidence of common reputation. (Act 190 sec. 298 (13); Cal. Code C. P. 1870 (13).

2 "Chiefly matters connected with property rights, franchises, customary privileges and the like." I Greenleaf, Ev. (Wigmore) p. 214.

SEC. 155. **Pedigree**[1] may be proved by:

1. Common reputation existing previous to the controversy[2].

2. The declaration, act or omission of a member of the family who is not living or is outside the jurisdiction of the Philippine Islands[3].

3. Entries in family bibles, books or charts, engravings on rings, family portraits and the like[4].

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1 "The term pedigree embraces not only descent and relationship but also the facts of birth, marriage and death and the times when these events happened." 1 Greenleaf, Ev. sec. 104.

2 Act 190, sec. 268 [11]; U. S. v Bergantino, 3 Phil. 118; 2 Off. Gaz. 109. Cf. note 1 to preceding section.

3 Id. sec. 281, 298 [4]; Cal. Code C. P. sec. 1852. This section extends the English common law rule which required that the declaration must have been *ante litem motam* (previous to the controversy). (Berkeley Peerage Case, 4 Campbell 401; Thayer's Cases on Evidence, 373,376, (1811).

4 Act 190, sec. 298 (13).

SEC. 156. **Boundaries** may be proved by:

1. Common reputation existing previous to the controversy[1].

2. Declarations of a disinterested decedent with opportunity of knowledge[2].

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1 Act 190, sec. 298 [11]; Cal. Code C. P. sec. 1870 [11]; II Wigmore Ev. sec 1582 *et seq.*

2 1 Greenleaf, Ev. sec. 140a; II Wigmore, Ev. secs. 1563 *et seq.*

SEC. 157. **Decedent's Writings.** The entries[1] and other writings[2] of a deceased person in a position to know the facts are admissible if made at or near the time of the transaction, in a professional capacity or course of conduct or in the performance of ordinary, regular or official duty. (Act 190, sec. 328; Cal. Code C. P. sec. 1954).

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1 For entries against interest see sec. 150 *supra.*

2 Such writings are admissible regardless of the requirements of the Code of Commerce. Tan Machan v. Trinidad, 3 Phil. 684; 2 Off. Gaz. 473.

SEC. 158. [**Books of Account** showing continuous dealings with persons generally, and containing original entries of charges at different times, by one party against the other, made by the party or his clerk, in the ordinary course of business, at or near the time of the transaction, are admissible in evidence if duly authenticated by the oath of the person making the entries or otherwise[1].]

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1 This rule is so well established a part of the Anglo-American system of evidence at common law (1 Greenleaf, secs. 120b, 120c; McKelvey, Ev. secs. 163-171; Thayer's Cases 507-44) as well as under the Codes (e. g. Neb.

Code C. P. sec. 346) that it is inserted here, tho not expressly re-enacted by the Philippine Code from which, however, its omission may have been an oversight. See Cal. Code C. P. sec. 1947.

SEC. 159. **Learned Treatises.** Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, are *prima facie* evidence of facts of general notoriety and interest. (Act 190 sec. 320; Cal. Code C. P. sec. 1936; III Wigmore, Ev. sec. 1690 *et seq.*)

SEC. 160. **Official Statements**[1]. Entries in public or other official books or records of the Philippine Islands, by a public official or other person[2], in the performance of a duty specially enjoined by law, are admissible. (Act 190, sec. 315; Cal. Code C. P. 1920).

1 III Wigmore, Ev. ch. LIV.
2 Kennedy v Doyle, 10 Allen (Mass) 161; Thayer's Cases 437 (1835). For mode of proof see sec. 165 *infra*.

SEC. 161. **Affidavits** are written declarations under oath[1]. They are admissible[2] to prove[3] the service[4] of process, notices or other papers in an action or special proceeding to obtain a provisional remedy[5] or upon a motion.

1 Act 190, sec. 348. The oath may be administered by any appointee of the Governor-General, (Act 1407 sec. 36), officers authorized by law to take depositions (see *infra* sec. 201) and clerks of courts. (Act 190 secs. 349-352, Cal. Code C. P secs. 2012-2014).
2 The affiant not being subject to cross-examination, affidavits would be excluded as hearsay, but for the statutory exception. Hence they can only be used in the cases expressly authorized. See III Wigmore, Ev. sec. 1708.
3 Besides being admitted in evidence they may be used to verify pleadings and other papers [Act 190, sec. 348; Cal. Code C. P. sec. 2010).
4 Proof of publication of a document or notice required to be published in a newspaper may be made by the affidavit of its publisher or of his foreman or principal clerk, annexed to such notice and specifying the paper and the times of publication. If required in an action or special proceeding it may be filed with the court clerk. (Id.)
5 Including the examination of witnesses. See *infra* sec. 205.

SEC. 162. **Testimony at a former proceeding**[1] duly taken, where the parties and questions at issue were substantially[2] the same as in the cause pending, is admissible when the witness

1 U. S. v. Macomb, 5 McLean (U. S.) 286; 36 Fed. Cas No. 15, 702; Thayer's Cases 338. (181).
2 Morgan v. Nicholl, L. R. 2 C. P. 117; Thayer's Cases 335 (1866).

is dead[1] physically or mentally incapable of attending or testifying,[2] absent from the jurisdiction[3] or inaccessible[4]. (Act 190. sec. 298 (8) (cf. sec. 355); Cal. Code C. P. 1870 (8); cf. G. O. 58 sec. 15 [5].)

The rule is stated above somewhat more in detail than in the Code but it is in accordance with the following authorities: I Greenleaf, Ev. 163g; Stephen's Digest, Art. 32; McKelvey, Ev. secs. 156-161.

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1 Yale v. Comstock, 112 Mass. 267; Thayer's Cases 332. (1873).

2 Rex v. Eriswell, 3 T. R. 707; Thayer's Cases 322 (1790).

3 Minn. Mill. Co. v. R. Co., 51 Minn. 304; 53 N. W. 639; Thayer's Cases 333 (1892).

4 In the absence of the foregoing circumstances it is error to consider in one cause evidence taken in another. U. S. v. Tanjuanco, 1 Phil. 116.

SEC. 163. **Res Gestae**[1]. A declaration, act or omission forming part[2] of a transaction which is itself a fact in dispute, or evidence of that fact, is admissible as part of the *res gestae*[3]. (Act 190 sec. 279, 298 (7); Cal. Code C. P. sec. 1850).

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1 These are not genuine exceptions to the Hearsay Rule, since the real question is whether the declaration was made or the act committed not whether the statement is true. See III Wigmore, Ev. sec. 1768 *et seq.*

2 Statements by the accused immediately after committing the crime, that he had been ordered to do so by a superior, are admissible. U. S. v. David, 3 Phil. 128. But a conversation with a locomotive engineer "between ten and thirty minutes" after a railway accident, was held to be "the mere narration of a past occurrence, not a part of the *res gestae.*" Vicksburg etc. R. Co. v. O'Brien, 119 U. S. 99; Thayer's Cases on Evidence 667 (1886).

3 Spontaneous exclamations and expressions of bodily and mental feeling are often treated by the courts as *res gestae* but such usage is criticised by the best text writers who treat them as real exceptions to the Hearsay Rule. (III Wigmore, Ev. sec. 1715; Thayer's Cases, 586 *st seq.*)

b. COPIES ETC. EXCLUDED.

SEC. 164. **General Rule: Exceptions.**

Secondary evidence of the contents[1] of a writing is inadmissible, except when the original:

1. Has been lost or destroyed[2] or is beyond the jurisdiction of

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1 This does not exclude independent evidence of a collateral or other fact merely because it is recited in a document. Rex v. Holy Trinity, 7 B & C. 611; Thayer's Cases 799 (1827); Coonrod v. Madden, 126 Ind. 197; Thayer's Cases 803 (1890).

2 This applies to documents executed before the present code of procedure. There is no vested right in rules of evidence. Aldeguer v. Hoskin, 2 Phil. 500; 1 Off. Gaz. 727.

the court[1], [or, is not easily movable[2]]. After proof of such fact[3] and of due execution the contents of the writing may be shown by a copy[4], by a recital of such contents in some authentic document, or by a witness.

2. Is in the possession [or under the control, or kept away by the fraud[5]] of the adverse party [or of one[6]] who fails to produce it upon reasonable notice [or *subpoena duces tecum*[7]]. In such cases the contents may be proved as in the preceding subdivision; but if merely in the possession of the adverse party, without any of the other circumstances mentioned, he is entitled to reasonable notice[8] to produce the writing unless it is itself a notice.

3. Consists of numerous accounts or documents not conveniently examinable in court, and the proposed evidence is only the general result of the whole and is calculable [in which case such result may be given in the form of testimony by a competent witness[9]].

4. Is an official document or the public record of the acts of public officers, bodies or tribunals or of a public or private writing. No such document or record may be removed[10] from the place of custody for use in evidence except upon order of a court in cases where inspection thereof is shown to be essential to a just determination of a pending cause or where the sessions of such court are held in the same building with such place of custody. (Act 190 secs. 284, 299, 321, 330, 331; Cal. Code C. P. secs. 1855, 1888, 1938, 1950.)

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1 Found in sec. 1855 of the Cal. Code C. P. from which sec. 284, Act 190, was taken and an established rule. Stephen's Dig. of Ev. (Chase's Ed.) p. 188, n. 3.

2 As inscription on tombstone (North Brookfield v. Warren 16 Gray (Mass.) 171) or wall. Mortimer v. McCallan, 6 M. & W. 67; Bruce v. Nicolopulo 11 Exch. 133.

3 Johnson's Case 26 How. St. Tr. 437; Thayer's Cases 791 (1805).

4 Except as to those mentioned in this sub-division, proof by copy is not required; the law recognizes no degrees of secondary evidence. Doe v. Ross 7 M. & W. 102; Thayer's Cases 812 (1840); Goodrich v. Weston, 102 Mass. 362; Thayer's Cases 814 (1869)

5 Grimes v. Kimball 3 Allen (Mass) 518; Nealley v Greenough 25 N. H. 325; Mitchell v. Jacobs, 17 Ill 235.

6 Stephen's Dig. of Ev. Art. 71.

7 Id. p. 187 note.

8 A party is not obliged to offer in evidence a writing produced, pursuant to his demand, by the adverse party. (Act 190 sec. 323; Cal Code C. P. sec. 1,939.)

9 12 Wigmore Ev. sec. 1230.

10 See Op. Atty. Gen., 4 Off Gaz. 770.

SEC. 165. **Public Records: Certifed Copies.**

The contents of any document or record included in those mentioned in the last subdivision of the preceding section may be proved by a copy thereof, certified to be a correct transcript of the original by its legal custodian under the seal, if there be one, of his office or court. If the maker of the cer-

tificate is acting under the authority of an American state or territory his certificate must be accompanied by the certificate, under seal, of the secretary of such state or territory, or of a judge of a court of general or final jurisdiction thereof, to the effect that such maker of the first named certificate is the legal custodian of the original. If the latter is acting under the authority of a foreign country or sovereign there must also be a certificate under the seal thereof to the same effect as that last mentioned. (Act 190 secs. 313, 314, 318, 605; Cal. Code C. P. secs. 1918, 1919, 1923.)

SEC. 166. **Judicial Records.** If the record be of the proceedings of a court of record or the official acts of a judicial officer in an action or proceeding in such a court, the certificate may be made by the clerk of the court under the seal thereof but must be accompanied by a certificate of the chief judge or presiding magistrate of said court that the attestation is in due form and, if it be a court of a foreign country, made by the clerk or other proper officer thereof and that the signature purporting to be his is genuine. The signature of a foreign judge or magistrate to such certificate must be authenticated by the certificate of an American diplomatic or consular representative to that country. (Act 190 secs. 303, 304; Cal. Code C. P. secs. 1905, 1906.)

SEC. 167. **Examined[1] Copies.** A copy of a judicial record of a foreign country is also admissible in evidence upon proof that:

1 It has been compared by the witness with the original and is an exact transcript thereof.

2 Such original was in the custody of the clerk or other legal custodian thereof.

3 The seal, if there be one, of the court where the record remains, or, if it be not a court of record, the signature of the legal custodian, attests the copy.

(Act 190 sec. 305; Cal. Code C. P. sec. 1907.)

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1 "There is properly no preference for a *certified* or office copy over a *sworn* or examined copy." II Wigmore, Ev. p. 1551.

SEC. 168. **Justice of the Peace Record.** If the record be of the proceedings of a justice of the peace the certificate first named in sec. 166 *supra* may be made by such justice but it must be accompanied by a certificate, under seal of his court, of the clerk of the court of first instance, or other court of general jurisdiction, of the district in which the maker of such first named certificate resides, that he was, at the date of the proceedings recorded, a

justice of the peace of the locality named and that his signature is genuine. (Act. 190 secs. 316, 317; Cal. Code C. P. secs. 1921, 1922).

SEC. 169. **Printed Copies.** Books printed or published under public authority and purporting to contain the statute law of a state or country, or the reports of judicial decisions[1] thereof, and proved to be commonly received in the tribunals thereof as evidence of such law or decisions are so admissible here. (Act 190, secs. 300, 302; Cal. Code C. P. secs. 1900, 1902).

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1 See III Wigmore, Ev. sec. 1703.

SEC. 170. **Non-Statutory Law: Oral Proof.** The testimony of a witness proved to be skilled in the nonstatutory law of a state or country other than the Philippine Islands is admissible as evidence of such law. (Act 190 sec. 302; Cal. Code C. P. 1902).

c PAROL VARIATION EXCLUDED.

SEC. 171. **General Rule.** Secondary[1] evidence is inadmissible between the parties[2] to affect the the terms of a written instrument, *except*:

1. To prove the circumstances under which it was made[3].
2. To correct mistake, explain ambiguity[4] or supply omissions or other grounds of incompleteness or imperfection[5].
3. To establish illegality, fraud or other grounds of invalidity[6].

(Act 190 sec. 285; Cal, Code C. P. sec. 1856; Pastor v. Gaspar 2 Phil. 599; 1 Off. Gaz. 875.)

This is the famous "parol evidence rule", which is declared by the best commentators to be rather a rule of substantive law than of evidence (Thayer's Cases 820; Greenleaf, Ev. sec. 305a), and the reason usually given for the rule is the presumption that the writing expresses the in-

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1 The rule excludes not only oral but all extrinsic evidence (I Greenleaf, Ev. sec. 305a (2).)

2 Kellogg v. Tompson 142 Mass. 76: 6 N. E. 860; Thayer's Cases. 827. (1886).

3 Brick v. Brick 98 U. S. 514; Thayer's Cases 887 (1878); cf. Machan v. Trinidad[4] 3 Phil. 686.

4 As where technical terms are used or the language is indefinite or obscure.

5 As where the instrument embodies only part of an agreement Allen v. Pink, 4 M & W 140; Thayer's Cases 830 (1838); collateral agreements. Morgan v. Griffith, L. R. 6 Ex. 70; Thayer's Cases 842 (1871). But cf. Angell v. Duke 32 L. T. R. (N. S.) 320; Thayer's Cases 843 (1875); Naumburg v. Young 44 N. J. L. 331; Thayer's Cases 849. (1882).

6 Pym v. Campbell, 6 E & B 370; Thayer's Cases 830 (1856) Trumbull v. O'Hara 71 Conn. 172; 41 Atl. 546; Thayer's Cases 834 (1898).

tent of the parties and the relative unreliability of other evidence (McKelvey, Ev. sec. 275.) It is not peculiar to the English law. *Contra scriptum testimonium, testimonium non scriptum non fertur* was the maxim of the civil law. See also Ricci, Tratado de las Pruebas (Buylla and Posada's edition, Madrid,) p 414 *et seq.*

2 Evidence excluded from public policy and other reasons.

SEC. 172. **Official Communications.** A public officer cannot testify as to communications made to him in official confidence if public interests would suffer thereby. (Act 190 sec. 383 (6); Cal. Code C. P. 1881 (5); Worthington v. Scribner 109 Mass. 487; Thayer's Cases 1171 (1872)).

SEC. 173. **Marital Affairs.** One spouse[1] cannot, without the other's consent,[2] testify for or against the other[3] nor as to communications between them during marriage, except in a prosecution for a crime committed, or a civil action, by one against the other. (Act 190 sec. 383 (3), (cf. G. O. 58 sec. 58); Cal. Code C. P. sec. 1881 (1)).

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1 The civil law (Code art. 1247) disqualifies other relatives.

2 Salonga v. Concepcion, 3 Phil. 563; 2 Off. Gaz. 513.

3 Prof. Wigmore (I Ev. sec. 600 *et seq.*) strongly criticises this rule and recommends its abolition, which has been effected in some jurisdictions. Id. p. 591 *et seq.*

SEC. 174. **Impeaching legitimacy.** Evidence is inadmissible to show the illegitimacy of issue born more than one hundred and eighty days after marriage or less than three hundred days after its dissolution, the wife cohabiting with her husband and the letter not being impotent. (Act 190 sec. 333 (3); Cal. Code C. P. sec. 1962 (5)).

SEC. 175. **Professional Comunications.**[1] No attorney may, without his client's consent, testify as to communications[2] between them in the course of professional employment nor, without the consent of both, may an attorney's clerk or other employee, testify to any fact learned in such capacity. (Act 190 secs. 31, 383 (4); Foster v. Hall 12 Pick. (Mass.) 89; Thayer's Cases 1150. (1831)).

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1 *Rationale.* "If such communications were not protected, no man *** would dare to consult a professional adviser with a view to his defence, or to the enforcement of his rights." (I Greenleaf Ev. sec. 238).

2 Cal. Code C. P. 1881 (2) excepts communications "in furtherance of a crime or fraud then being perpetrated or in contemplation."

SEC. 176. **Spiritual Communications.** No clergyman or priest may, without the penitent's consent, testify as to any

confession to the former by the latter in the course of discipline enjoined by the church to which he belongs. (Act 190, sec. 383 (5); Cal. Code C. P. 1881 (3)).

After an exhaustive review Prof. Wigmore (IV Ev. sec. 2396) concludes that "this privilege has adequate grounds for recognition". It is of statutory and Civil Law origin. (I Greenleaf Ev. sec. 247; I Mascardusf *De Probatione*, Quarto 5 n. 61.)

SEC. 177. **Occurrences before Defendant's Disability or Death.** Parties (or their assignors or beneficiaries) to any proceeding upon a claim against a person of unsound mind or the estate of a decedent, cannot testify as to occurrences before the disability or death[1]). (Act 190 sec. 383 (7); Cal. Code C. P. sec. 1880 (3).)

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1 Even a milder form of this rule is strongly critised by Prof. Wigmore (I Ev. sec. 578). It should not be extended beyond the strict letter of the statute. (St. John v. Lofland, 5 N. D. 140; 64 N. W. 930); nor does it preclude the plaintiff from testifying in his own behalf. (Sedgwick v. Sedgwick, 52 Cal. 336; McGregor v. Donelly, 67 Cal. 149; cf. Meyers v. Reinstein, 67 Cal. 89.

SEC. 178. **No confession**[1] of any person charged with crime shall be received as evidence against him by any court of justice unless it be first[2] shown to the satisfaction of the court that it was[3] freely and voluntarily made and not the result of violence, intimidation, threat, menace, or of promises or offers of reward or leniency[4]. (Act 619 sec. 4; U. S. v. De la Cruz 2 Phil. 148; 5 Phil. 24; U. S. v Lozada, 4 Phil. 226; 3 Off. Gaz. 450; U. S. v. Ramos, 4 Phil. 389; U. S. v. Gregorio, Id. 443; 3 Off. Gaz. 527; U. S. v. Caballeros, 4 Phil. 350; 3 Off. Gaz. 315).

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1 Confessions are direct assertions of guilt on the part of the accused. (I Wigmore, Ev. sec 821; I Greenleaf, Ev. sec. 213; Thayer's Cases 285n). They do not include admissions made after plea from which guilt may be inferred. (U. S. v Magtibay 2 Phil. 703; U. S. v Tolosa 5 Phil. 616.) See also *ante* sec. 142.

2 Failure to object is not a waiver of this requirement; it may be raised at any stage. (U. S. v. Pascual, 2 Phil. 457.)

3 It is not sufficient that the confession *appears* to have been voluntary if, in fact, it was forced. (U. S. v. Mercado, 6 Phil. 332; 5 Off. Gaz 86.)

4 If voluntary, the accused's confession may be used against him. Ley Provisional art. 52 (2) tho not against his co-defendant. (U. S. v. Paete 6 Phil. 105; 5 Off. Gaz. 70.)

SEC. 179. **Impeaching Landlord's Title.** Evidence is not admissible in behalf of a tenant tending to disparage his landlord's title at the time of the commencement of the relation beween

them. (Act 190 sec. 333 (2); Cal. Code C. P. sec. 1962 (4); I Greenleaf. Ev. sec. 25.)

SEC. 180. **Estoppel.** Evidence is inadmissible in behalf of a party to litigation arising out of any declaration, act or omission of his, to contradict the same, if he has thereby intentionally led another to believe and act thereon[1]. (Act 190 sec. 333 (1); Cal. Code C. P. sec. 1962 (3); Macke v. Camps, 7 Phil. 553; 5 Off. Gaz. 20).

1 Trinidad v. Ricafort, 7 Phil. 449; 5 Off. Gaz. 196.

SEC. 181. **Character**[1]. In civil causes[2] evidence of a party's character is not admissible unless the latter has been impeached or is directly in issue[3]. [In criminal causes the accused may introduce evidence of his good character which the prosecution may meet with evidence of his bad character[4].]

1 In the law of evidence the word as generally used, means "reputation as distinguished from disposition". Stephen, Dig. of Ev. Art, 56.

2 Act 190, sec. 344; Cal. Code C. P. sec. 2053.

3 As in actions for defamation, seduction, etc. I Wigmore, Ev. sec. 70 *et seq.*

4 I Greenleaf, Ev. sec. 14b. The character as to chastity, of the prosecutrix for rape and similar crimes and the character as to aggressiveness of the deceased in homicide cases are admissible. (I Wigmore Ev. secs. 62, 63).

TITLE IV

INSTRUMENTS AND PRODUCTION.

I. WITNESSES.

a. In General.

SEC. 182. **Qualifications.** All persons with organs of sense, capable of perceiving and making known their perceptions, may be witnesses. Those of unsound mind and children not so capable are incompetent to testify. No disqualification results from religious opinion, conviction of crime[1] or interest[2] tho the two latter circumstances and other competent evidence may be con-

1 An accomplice is a competent witness. U. S. v. Ocampo, 5 Phil. 339; 3 Off. Gaz. 372; 4 Id. 8; U. S. v. Aguasa, 4 Phil. 274; 3 Off. Gaz. 363.

2 Gonzaga v. Cañete, 3 Phil. 397. Both Civil (Code art. 1247) and Common law, disqualified the parties to an action but the latter has been modified by a series of statutes beginning about 1846. (I Wigmore, Ev. sec. 603.)

sidered as affecting credibility.[1] (Act 190 secs. 382-3; G. O. 58 sec. 55; Cal. Code C. P. secs. 1879-81.)

1 U. S. v. Yu-To Chay, 4 Phil. 613; 4 Off. Gaz. 176.

SEC. 183. **Place of testifying.** Except as otherwise provided by law[1], all testimony shall be given orally, in open court.[2] (Act 190 secs. 63, 381).

1 See *infra*, secs. 200-204 (Depositions).

2 Under the English chancery practice the testimony was taken before examiners outside the presence of the court. Langdell, Equity Pleading, sec. 90. A similar practice prevails on the chancery side of the American Federal courts. Amendment of 1851 to Rule 67.

SEC. 184. **Accused's Right[1] of Confrontation.** In all criminal prosecutions the accused is entitled to be confronted by, and to cross-examine, the witnesses against him. But where this opportunity has once been given, and the witness is dead or insane, or cannot, with due diligence, be found in the archipelago, his deposition may be read.[2] (Phil. Bill. sec. 5; G. O. 58, sec. 15 (5); II Wigmore, Ev. sec. 1397; U. S. v. Tanjuanco, 1 Phil. 374.)

1 This right may be waived. U. S. v. Anastasio, 6 Phil. 413;4 Off. Gaz. 579.

2 Except in the special cases here mentioned the report of evidence taken at a preliminary investigation is not admissible. U. S. v. Capisonda, 1 Phil. 575; U. S. v. Castillo 2 Id. 17; U. S. v. Abuan, Id. 130. But as against the accused (tho not as against a co-defendant U. S. v. Candelaria 4 Phil. 543; 4 Off. Gaz. 169), it is permissible to prove any self-disserving statements made by the accused at the preliminary investigation. U. S. v. Caligagan, 2 Phil. 433; 1 Off. Gaz. 665.

b. Attendance.

SEC. 185. **One actually present** at the proceeding may be required to testify without subpoena. (Act 190 sec. 407; Cal. Code C. P. sec. 1990).

Witness imprisoned. If the witness be confined in a jail or prison within the province where the action is pending, an order may be made by a judge of the court of first instance of said province, or of the Supreme Court, (upon motion supported by affidavit showing the nature of the proceeding, the testimony expected and its materiality) for the production of the witness or, if confined elsewere in the Philippines, for the taking of his deposition. (Act 190 sec. 411. Cf. Cal. Code C. P. sec. 1995.)

SEC. 186. **Subpoena** is the process by which the attendance of a witness is required[1]. It must be directed to him and specify the time and place of testifying. It may also require him to produce books[2], documents or other articles under his control and is then called a subpoena *duces tecum*. (Act 190 sec. 402; Cal. Code C. P. sec. 1985; Wigmore, Ev. secs. 2199, 2200.)

Form: Subpoena. To .... of .... Greeting:

You are hereby commanded to be and appear at the Court of First Instance [or Justice of the Peace] in and for the province [or municipality] of .... on the ... ... day of ...., 19 .. .. at ... . o'clock in the forenoon (or afternoon) then and there to testify in the action of .... against .... there pending.

[For subpoena *duces tecum* add: "and to bring with you into court the following described [book, deed, writing, or other document]: it being necessary to use the same as testimony in said cause.)

Fail not, under penality of the law.

Witness, the Honorable .... Judge of said Court, this ... . day of .... 19 ....

.... Clerk".

(Act 190 sec. 784 form 38) (or Justice of the Peace).

1 *Who entitled to.* In civil cases the subpoena may be issued at the instance of either party (Act 190 sec. 68). In all criminal prosecutions the accused has the right to compulsory process to compel the attendance of witnseses in his behalf. (Phil. Bill (July 1, 1902) sec. 5).

2 A justice of the peace may require a merchant to bring his books but not a registrar of property to produce official records. (Op Atty-Gen.) 4 Off. Gaz. 770.

SEC. 187. **Issuance.** A judge or justice of the peace[1] may issue a subpoena to require attendance within his territorial jurisdiction[2] before himself or another officer empowered to take testimony.[3] It may also be issued by such other officer.[4] If attendance is required before a court having a seal and a clerk the subpoena must be issued under such seal and signed by such clerk or by the judge. (Act 190, secs. 68, 366,403.)

1 A justice cannot compel attendance, as expert witness, of president of provincial board of health. (Op. Atty-Gen) 3 Off. Gaz. 85.

2 But not from a distance of more than thirty miles by the usual course of travel from his place of residence. (Act 190, sec. 406; Cal. Code C. P. sec. 1989.)

3 If the deposition is to be used outside of the Philippine Islands a commission to take it must have been issued by the court or a judge

thereof wherein the action or proceeding is pending, or it must be made to appear by satisfactory affidavit that by the law of such outside forum such deposition will be received in evidence, without such commission and that none such has been issued. The materiality of testimony to be used outside the Philippine Islands must first be made to appear by satisfactory affidavit. (Act 190, sec. 365-7; Cal. Code C. P. secs. 2035-7.)

4 Besides officers empowered to take depositions (*infra* sec. 201) subpoenas may be issued and enforced, in proceedings pending before them, by provincial boards (Act 1126, sec. 1) and courts martial and naval (Act 1130 as amended by Act 1243.)

SEC. 188. **Service** of a subpoena is made by delivering personally[1] to the witness a true copy, attested to be such by the person serving it, who may be any one specially authorized by the functionary issuing it, as well as the sheriff or his deputy. Service must be made so as to allow the witness reasonable time for preparation and travel to the place of attendence and he is entitled, if he demands it, to advance payment of his fees[2] for such travel and one day's attendance. (Act. 190, secs, 68, 404; Cal. Code C. P. sec. 1987).

1 If the witness be concealed in a building or vessel it may be forced open by the sheriff so as to serve the subpoena, if ordered by the authority issuing it. (Act. 190, sec. 405; Cal. Code C. P. sec. 1988).

2 *Witness Fees.*

Supreme or First Instance Courts.	Per diem.	Mileage.
	₱1.	·05 one way.
Justices, Municipal and other inferior Courts	₱ .50	do.
Military and Naval Courts,	₱3.	.10 both ways.

Fees are allowed for attendance in but one case at the same time; mileage for the shortest usual route. (Acts. 190, sec. 793; 1130 as amended by 1243).

SEC. 189. **Enforcing Obedience.** In case of the failure of a witness to attend, the court[1] issuing the subpoena may, upon proof of service thereof and of such non-attendence, issue a warrant to arrest the party subpoenaed and bring him before the proper court or officer. Disobedience of a subpoena, refusal to be sworn, to answer questions, or to subscribe a deposition when required, may be punished as a contempt by the court[2] issuing the sub-

1 The original section adds the words "or officer" but sec. 403 (3) empowers any judge or justice of the peace "in places within their respective jurisdiction * * * to enforce attendance, and, upon certificate of contumacy to said court, to punish contempt of their process". (Cf. Cal. Code C. P. sec. 1991). It would, therefore, seem to be the better practice for any other "officer" to report any non-attendance or refusal to answer, to the judge of first instance of the district.

2 See preceding note.

poena. If the contumacious witness be a party his pleading may be stricken out. All costs in proceedings to punish for such disobedience are taxable against the party found guilty thereof.[1] (Act. 190, secs. 408, 410; Cal. Code C. P. secs. 1991, 1993).

1 *Civil Liability*, "A witness, wilfully and without cause, disobeying a subpoena, shall be liable for all damages which may be sustained by reason of the failure of the witness to attend, which damages may be recovered in a civil action." (Act 190 sec. 409; cf. Cal Code C. P. sec. 1992.)

c. Examination.

SEC. 190. **Oath.**

Every witness, before testifying, must take an oath[1] (or affirmation[2]) that the testimony he is about to give in the cause on trial shall be the truth, the whole truth and nothing but the truth[3]

1 Act 190, sec 381; G. O. 58 sec. 32.

2 Such is now the almost universal rule in Anglo-Saxon countries. See III Wigmore, Ev. sec. 1828, especially p. 2371.

3 Act 190, sec. 369 (restricted to depositions but the same form should be used for all witnesses). The form given is substantially that used at common law. III Wigmore, Ev. sec. 1818.

SEC. 191. **The Exclusion of all Witnesses,** except the parties and the one testifying, may be demanded by either party or directed by the court upon its own motion. (III Wigmore, Ev. sec. 1838, 1839, containing an interesting historical account of the practice; G. O. 58, sec. 39; U. S. v. Sison, 7 Phil. 421; 4 Off. Gaz. 602.)

SEC. 192. **Order of Proof.**

Ordinarily the party holding the burden of proof[1] must first present his *case in chief*; the adverse party then makes his *defense*, after which the former may offer evidence in *rebuttal* (which must be confined strictly to the refutation of new evidence brought out by the defense) and the latter in turn, evidence in *surrebuttal* correspondingly restricted. The trial court has discretion however, to vary this order. (Act 190 secs. 56 (*ante* 35 132 (1, 2, 3); III Wigmore, Ev. secs. 1866, *et seq*).

1 See *ante* sec. 139.

SEC. 193. **Same: Individual Witness**[1].

1 See on this topic III Wigmore, Ev. sec. 1882 *et seq*.

The *direct* examination[1] is that conducted by the party calling the witness. It may always be followed by cross-examination[2], by the adverse party upon the same subject[3]. This right is to be liberally construed, but its restriction within proper limits is discretionary with the trial court[4]. *Redirect* and *recross* may follow but neither *direct* nor *cross* may be repeated nor a witness recalled without leave of court which is likewise discretionary[5].

1 The following are from Brown's "Golden Rules for the Examination of Witnesses" (reprinted in "Wellman's Art of Cross-examination", p. 399):

V. Never call a witness whom your adversary will be compelled to call.

VI. Never ask a question without an object, nor without being able to connect that object with the case if objected to as irrelevant.

VII. Be careful not to put your question in such a shape that if opposed for informality you cannot sustain it, or, at all events, produce strong reason in its support.

VIII. Never object to a question from your adversary without being able and disposed to enforce the objection. Nothing is so monstrous as to be constantly making and withdrawing objections.

Cross Examination. IV. In a *criminal*, especially in a *capital* case, so long as your cause stands well ask but few questions. (Id. 401).

(John G. Carlisle, a distinguished American lawyer and statesman, says that the danger in cross-examination is asking too much.)

V. An equivocal question is almost as much to be avoided and condemned as an equivocal answer. (Id, 402").

Failure to object waives error in admitting improper evidence. (Loper v Standard Oil Co.; 5 Phil. 549; 4 Off. Gaz. 156; De Dios v Velasco 2 Phil. 658, 661).

2 Act 190, secs. 339 (Cal. Code C. P. sec. 2048), 381; G. O. 58, sec. 15. The rule requiring an offer of testimony in order to predicate error upon its exclusion has been held inapplicable to cross-examination. 72 Vt. 335.

3 Act 190, sec. 339; cf. Cal. Code C. P. sec. 2045. This restriction seems to have originated in a dictum in Ellmaker v. Buckley 16 S. & R. (Pa.) 88 (1827). It has been much criticised and its relaxation is discretionary with the trial court. (III Wigmore, Ev. sec 1888 *et seq.;* Act 190, sec. 339).

4 Act 190, sec. 381.

5 Id. secs. 339, 341.

SEC. 194. **Leading Questions**, (those which suggest the answer sought) are permissible on strict cross-examination[1] but not elsewhere, unless, in the discretion of the court, the interests of justice appear so to require. (Act 190 secs. 339, 337; Cal. Code C. P. secs. 2048, 2046; I Wigmore Ev. sec. 769 *et seq*).

1 I. e. on the subject of the direct. The reason for so allowing it is, of course, the probable adverse attitude of the witness. (I Wigmore Ev. sec. 773).

SEC. 195. **Complementary Evidence.** When an act, declaration or conversation, or a part thereof, is the subject of testimony the adverse party may introduce evidence of the remainder or of any fact necessary to make the former intelligible. (Act 119, sec. 283; Cal. Code C. P. sec. 1854).

SEC. 196. **Refreshing Recollection.** A witness may refresh his recollection by memoranda[1] prepared by himself, or under his direction, if he is able to swear to its correctness when made, tho if he retain no recollection of the facts contained therein his testimony must be received with caution. (Act 190, sec. 338; Cal. Code C. P. sec. 2047; 1 Wigmore Ev. sec. 744 *et seq.*)

1 These need not conform to the Code of Commerce. Tan Machau v. Trinidad, 3 Phil. 684; 2 Off. Gaz. 473.

SEC. 197. **Impeachment: Contradiction.** A witness may be impeached by evidence contradicting his or tending to show that he has at other times made statements inconsistent therewith. Such statements must first be repeated (or if in writing, shown) to him, the circumstances detailed and the witness be asked if he made the statements and allowed to explain[1]. (Act 190, sec. 342-3, 340, 298 (16); Cal. Code C. P. secs. 2051-2, 2049, 1870 (16)).

1 See II Wigmore, Ev. sec. 896 *et seq.;* sec. 905, where the limitation of this right to the adverse party is criticised and its abolition suggested.

SEC. 198. **Same: Character.**

A witness may be impeached by the adverse party, but not by the one producing him, by evidence that his general reputation for veracity is bad or that he has been convicted of a felony. Other evidence of specific wrongful acts is not admissible, nor is evidence of good character, until after such impeachment. (Act 190, secs. 340, 342; Cal. Code C. P. sec. 2051-2; G. O. 58, sec. 55, 56; II Wigmore, Ev., sec. 987.)

SEC. 199. **Privilege**[1]. A witness need not give an answer which will tend to subject him to punishment for felony[2] nor

1 For the history and reason of the privilege see III Wigmore, Ev. secs. 2250 *et seq;* U. S. v. Navarro, 3 Phil. 143; 2 Off Gaz. 551, especially dissenting opinion of Mapa J.

2 G. O. 58, sec. 56, providing also "nor need he give an answer which will have a direct tendency to degrade his character, unless it be to the very fact at issue," etc. G. O. 58 has "the effect of law" only "in criminal matters" (sec. 1), but the portion incorporated into the text is the general rule (III Wigmore, Ev. sec. 2256 *et seq*). As to the por-

shall the accused, in any criminal case, be compelled to be a witness against himself[1].

---

tion last quoted, however, the same author says (II Id. p. 1136): "*The privilege against disgracing answers* has in almost all jurisdictions disappeared. Its service, so far as it was useful, is better rendered by the rule of judicial discretion."

1 Philippine Bill (of July 1, 1902); Act 1130 as amended by Act 1243; U. S. v Navarro, 3 Phil. 143.

d. Depositions.

SEC. 200. **When Taken.** The deposition of a person may be taken for use in a civil action or proceeding, in any court, at any time after the service of summons or appearance of the defendant, or, in a special proceeding, after the question of fact has arisen, when the proposed witness:

1. Is a party, or an officer or member of a corporation which is a party, to the action or proceeding, or one for whose immediate benefit the same is prosecuted or defended.

2. Resides out of the province in which his testimony is to be used.

3. Is about to leave the province where the action is to tried and will probably continue absent when the testimony is required.

4. Is too ill or infirm to attend.

5. Need not be orally examined, as when the evidence is required upon a motion.

6. Is the only one who can establish facts or a fact material to the issue. (Act 190, sec. 355.)

In criminal prosecutions the accused may have the deposition of a witness taken upon either the third or fourth grounds mentioned above. (G. O. 58, sec. 60.)

SEC. 201. **Who May Take.** A deposition may be taken in the Philippines[1] before any judge, justice of the peace or notary public, or, if it is to be used outside the Philippines[2], it may also be taken before a commissioner named by the court or a judge thereof, wherein the action or proceeding is pending; or for use in the Philippine Islands, it may be taken in the United States,[3] before a justice of the peace, federal or state judge, commissioner authorized by the United States laws to take depositions, or other person agreed upon by the parties and named in a commission[4] issued from the court or a judge thereof wherein

1 Act 190, sec. 361; Cal. Code C. P. sec. 2031.

2 Act 190, secs. 365-6; Cal. Code C. P. secs. 2035-6.

3 Act 190, sec. 356; Cal. Code C. P. secs. 2024.

4 *The commission* may issue at the application of either party upon five days' notice to the other, under seal of the court, and must author-

the action or proceeding is pending[1], or, in any country outside United States territory,[2] before any person so agreed upon and named, or before an American diplomatic or consular representative.

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ize the commissioner to swear the witness and take his deposition in answer to such annexed interrogatories, direct and cross, as have been prepared by the parties, or, in case of disagreement as to their form, settled by the judge who signs the commission, or, in answer to oral questions respecting the matter in dispute if written interrogatories have been waived by agreement; and to certify the deposition to the court in a sealed enclosure directed to the clerk or other person agreed upon. (Act 190, secs 357-8; Cal. Code C. P. secs. 2025-6).

1 *Justice's Court.* A certificate, under seal, by the clerk of the court of first instance of the proper province, authenticating the signer of the commission, as, at the date thereof, an acting justice of the peace of said province, must accompany a commission issued from a justice's court. (Act 190, sec. 356; Cal. Code C. P. sec. 2024).

2 Id.

Sec. 202. **Notice.** The party seeking to have the deposition taken must serve on the adverse party a copy of an affidavit showing that the case is within section 200 and a notice of the time and place of taking, at least two days before such time, and must allow in addition the time necessary to reach such place[1] [by the usual route of travel]. In criminal prosecutions the notice must be served upon the fiscal or prosecuting attorney having the case in charge.[2]

1 Act 190, sec. 361.

2 G. O. 58, sec. 61.

Sec. 203. **Taking and Transmittal.** Either party may attend the examination and, personally or by attorney[1], question the witness, who shall first be sworn as if testifying in court. The testimony shall be written by the presiding officer or by some disinterested person in his presence and under his direction, and may be taken down in shorthand but must forthwith be reproduced in longhand. When completed the deposition must be carefully read to the witness, may be corrected, and must be subscribed, by him. The officer presiding at the examination must certify that these requirements have been observed[2] and deliver or send the deposition so certified in a sealed enclosure to the

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1 Act 190, sec. 33.

2 If the deposition is to be used in a forum outside the Philippines the certification and transmittal must conform to the law of such outside forum. (Act 190, sec. 368.)

clerk of the court in which the action is pending, or to some person agreed upon by the parties in writing. (Act 190 secs. 362, 363, 369; Cal. Code C. P. sec. 2032. Cf. G. O. 58 sec. 32).

SEC. 204. **Use.** Unless it appears at the time that the presence of the deponent can be procured[1], or that the taking of the deposition was unfair or fraudulent[2], it may be used by either party[3] as his evidence and subject to objection at any stage of the pending action or proceeding, or any other between the same parties and involving the same subject matter[4]. A party who appears at an examination shall not be heard to complain of the form of a question unless his objection shall have been made at the time and recorded by the presiding officer[5]; and any objections to the form of interrogatories, to be propounded to a witness outside the Philippines, must first be presented to the court issuing the commission[6]. The failure to receive such deposition shall not require a postponement of the trial without a satisfactory showing that the testimony is necessary and that proper diligence has been used to obtain it[7].

1 Act 190, sec. 355 (6).
2 Id. sec. 362.
3 Act 190, secs. 360, 362. 364, 612.
4 Id. sec. 362, 364; Cal. Code C. P. sec. 2021, 2032.
5 Act 190, sec. 362.
6 Id. sec. 357.
7 Act 190, sec. 359; Cal. Code C. P. sec. 2027.

e. Perpetuation of Testimony.

SEC. 205. **When authorized.** Any judge of the supreme or first instance courts may take for perpetuation the testimony of a witness after notice as required in the following section and upon the filing of a duly verified petition, reciting:

1. That the applicant expects to be a party to an action in a court in the Philippine Islands, or, if no such action is actually anticipated, that proof of some fact is necessary to perfect the title to property in which he is interested, or to establish marriage, descent, heirship, or any other matter which might become material to him.

2. The names, if known, of those who may be adverse parties to the action if anticipated.

3. The name, residence, and general outline of the testimony expected of the witness

(Act 190, sec. 370; Cal. Code C. P. sec. 2084).

SEC. 206. **Notice.** If the parties expectant are known and reside within the Philippine Islands each must be personally served with reasonable notice of the time and place fixed for hearing: if un-

known and property within said Islands may be affected by the proceedings, notice must be served by publication for three successive weeks prior to the appointed time in some newspaper designated by the judge and of general circulation in the province where such property is situated, and also by delivery to the clerk of the court of first instance for said province. (Act 190, sec. 371; Cal. Code C. P. sec. 2084).

SEC. 207. **Taking and Transmittal.**

The testimony shall, at the time and place fixed, be taken and transmitted according to the rules prescribed for taking depositions in section 203, except that the entire record, including petition, notice and testimony, shall be transmitted to, and filed[1] with, the clerk of the court of first instance for the province wherein the applicant resides, and shall be *prima facie* evidence of the manner in which the proceedings were conducted. (Act 190, secs. 372, 373, 374; Cal. Code. C. P. secs. 2086, 2087).

1 Copies may be obtained on paying the legal fees. Act 190, sec. 373.

SEC. 208. **Use.** The testimony so taken shall have the same effect as if given orally by the witness and may be used, subject to the rules provided for the use of depositions, in any action or proceeding against the parties named in the petition or those whose interest had not been discovered at the time of the filing thereof. (Act 190, secs. 375, 376; Cal. Code C. P. secs. 2088, 2089).

2 WRITINGS.

a Proof of authorship.

SEC. 209. **General Rule.**

(The execution of) any writing may be proved by:

1 One who saw it executed.

2 Evidence of the genuineness of the maker's handwriting.

3 A subscribing witness, or

4 Where the latter denies, or fails to recollect, such execution, other [competent], evidence.

(Act 190, secs. 324, 325; Cal. Code C. P. secs. 1940, 1941.)

SEC. 210. **Proof of Execution is Unnecessary**, where it is shown that the party against whom the writing is offered has admitted its execution, or that it is produced from his custody and has been acted upon by him as genuine [if more than thirty years old[1]]. (Act 190, sec. 326.)

1 The clause in [ ] does not appear in Cal. Code C. P. sec. 1942, from which the above was taken.

SEC. 211. **Proof of a Person's Handwriting** may be made by the testimony of one who believes it to be his and has either seen him write or has seen writing purporting to be his and [upon which the supposed writer[1]] has acted or been charged. The court may also [with or without the aid of experts[2]] compare[3] any proffered writing with others proved to be genuine or so admitted or treated by the party against whom the offer is made, or, if the proffered writing is more than thirty years old, and purports to be genuine, by those having an interest in knowing the fact. (Act 190, sec. 327; Cal. Code C. P. secs. 1943-5).

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1 Such is the langnage of the Cal. Code C. P. sec. 1943, from which the sentence is taken.

2. See III Wigmore, Ev. secs. 2012—2016; Moody v. Rowell, 17 Pick (Mass) 490; Thayer's Cases 706. (1836)

3 Mere resemblance is not sufficient to convict of forgery. U. S. v. Litonjua, 4 Phil. 485; 3 Off. Gaz. 532.

SEC. 212. **An alteration**[1] or appearance of alteration, after execution, in a part material to the question in dispute, renders a writing inadmissible until shown to have been made by consent of all parties affected, or without the concurrence of the one offering it, or of his privies, or otherwise innocently or properly, or not to have changed the meaning or effect. (Act 190, sec. 336; Cal. Code C. P. sec. 1982.)

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1 "The rules relating to alterations in writings are not properly parts of the law of evidence." Thayer's Cases, p. 777n.

b Proof of contents

SEC. 213. **General Rule.**

The contents of a writing, if otherwise competent, may always be proved by producing the original[1].

(Act 190, secs. 303, 298 (14), 313 (6, 7, 8), 331; Cal. Code C. P. secs. 1905, 1918 (6, 7, 8,) 1951.)

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1 For admissibility of copies, see *ante* secs. 164-169.

SEC. 214. **Inspection.** Either party may inspect any writing shown to a witness by the other.

(Act 190, sec. 355; Cal. Code C. P. sec. 2054)

3. REAL OR OBJECT EVIDENCE[1].

SEC. 215. **General Rule.** The court may, in its discretion, examine any object [or inspect any locality[2]] connected with the subject of litigation or affording a basis for a legitimate judicial conclusion regarding the same. [In criminal cases such inspection must take place in the presence of the accused and his counsel[3]] (Act 190, sec. 332; Cal. Code C. P. sec. 1954.)

1 Also called "autoptic preference." II Wigmore, Ev. sec. 1150 *et seq.*

2 Ley Provisional art. 52 (1). "This process, traditionally known as 'a view,' has been recognized since the beginnings of jury trial as an appropriate one." . II Wigmore, Ev. sec. 1162.

3 Such appears to be the effect of G. O. 58 sec. 15 (1) guaranteeing this right "at every stage of the proceedings." Prof. Wigmore considers the requirement unnecessary. III, Ev. sec. 1803.

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